

BIENNIAL REPORT
of the
ATTORNEY GENERAL
STATE OF FLORIDA

From January 1, 1967, through December 31, 1968

EARL FAIRCLOTH
Attorney General



Tallahassee, Florida
1969

CONSTITUTIONAL DUTIES OF THE ATTORNEY GENERAL

The revised Constitution of Florida of 1968 sets out the duties of the Attorney General in Subsection (c), Section 4, Article IV as:

" . . . the chief state legal officer."

In line with this increased range of responsibility of the Attorney General, attention is called to the mandate of the revised Constitution to the State Legislature to reorganize the Executive Branch of Government into no more than twenty-five departments. This reorganization, it is felt, will have a dramatic and profound effect on the office of Attorney General with respect to his duties, functions and responsibilities.

For this reason a listing of the former and current duties, functions and responsibilities of the Attorney General has been omitted from this edition.



EARL FAIRCLOTH
ATTORNEY GENERAL
STATE OF FLORIDA
TALLAHASSEE

January 2, 1969

LETTER OF TRANSMITTAL

TO HIS EXCELLENCY
HONORABLE CLAUDE R. KIRK, JR.
GOVERNOR OF FLORIDA

SIR:

One of my pleasant duties is to submit to you as Governor of the State of Florida my biennial report for the preceding two calendar years.

This report on the activities of the office of Attorney General consists principally of official opinions rendered by me during the calendar years of 1967 and 1968, a statement of constitutional and statutory authority, a listing of present personnel of the office of Attorney General, and the 1968 State Constitution in full text.

The opinions contained here are numbered like legislative bills, starting with the last two digits of the year, and with the numerical designation of the opinion and the date of the opinion following (067-1—January 10, 1967).

Other portions of this report include tables of statutory and constitutional sections cited in opinions and an alphabetical subject matter index.

Respectfully submitted,
EARL FAIRCLOTH
ATTORNEY GENERAL

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ATTORNEYS GENERAL OF FLORIDA SINCE 1845

JOSEPH BRANCH	1845-1846
AUGUSTUS E. MAXWELL	1846-1848
JAMES T. ARCHER	1848-1848
DAVID P. HOGUE	1848-1853
MARIANO D. PAPY	1853-1860
JOHN B. GALBRAITH	1860-1868
JAMES D. WESTCOTT, JR.	1868-1868
A. R. MEEK	1868-1870
SHERMAN CONANT	1870-1870
J. P. C. DREW	1870-1872
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WILLIAM A. COCKE	1873-1877
GEORGE P. RANEY	1877-1885
C. M. COOPER	1885-1889
WILLIAM B. LAMAR	1889-1903
JAMES B. WHITFIELD	1903-1904
W. H. ELLIS	1904-1909
PARK TRAMMELL	1909-1913
THOMAS F. WEST	1913-1917
VAN C. SWEARINGEN	1917-1921
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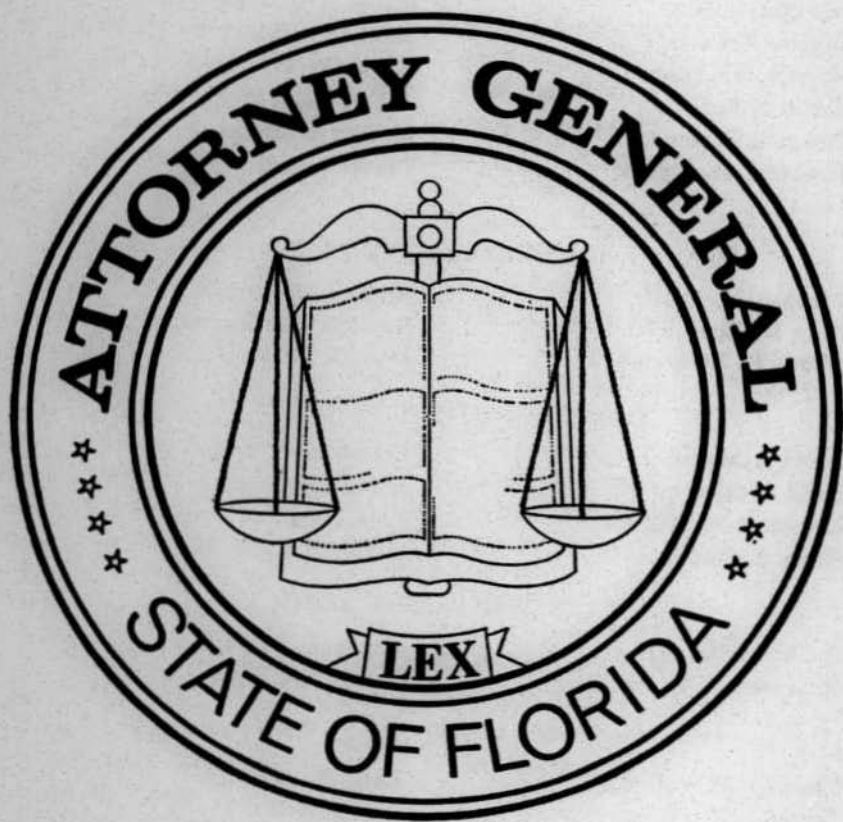
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*Miami Office

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*Earl Faircloth
The Capitol
Tallahassee*

BIENNIAL REPORT
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January 1, 1967, through December 31, 1968

067-1—January 10, 1967

RETAIL INSTALLMENT SALES ACT

LICENSING REQUIREMENT—INAPPLICABLE TO PERSONS
PERFORMING PROFESSIONAL SERVICES

To: *Fred O. Dickinson, Jr., State Comptroller, Tallahassee*

QUESTION:

Do professional groups, such as doctors, dentists, or other professional people, fall within the licensing requirements of Part V, Ch. 520, F. S., where a direct financial charge is made on such professional persons' accounts receivable?

Your question is answered in the negative. In order to answer your question I must examine Part II, Ch. 520, F. S., and the provisions found therein. Section 520.32(1), F. S., states:

For the privilege of conducting, engaging in and carrying on the business of *retail seller engaging in retail installment transactions as defined in this act*, there is hereby levied and assessed upon every such retail seller, for each store located and operated within this state for the conduct of such business an annual license fee in the sum of five dollars. (Emphasis supplied.)

Therefore, we must look to the definitions found in §520.31, F. S., to determine what persons, businesses or corporations are required to be licensed. Section 520.31(5), F. S., states:

"Retail seller" or "seller" means a *person regularly engaged in, and whose business consists to a substantial extent of, selling goods to a retail buyer*. (Emphasis supplied.)

It should be noted that the definition of "retail seller" includes only those: (1) Regularly engaged in selling goods to a retail buyer; and (2) Whose business consists to a substantial extent of selling goods to a retail buyer. Note that no mention is made to furnishing services.

Therefore, before a person would be required to be licensed under §520.32, F. S., it must be shown that such person is regularly engaged in, and that such person's business consists to a substantial extent of, selling goods. This is in the conjunctive, not disjunctive. This means that both number one and number two listed above must be shown to exist before a person would be within the licensing requirements of §520.32, F. S.

In addition to this, if such a person meets the requirements of one and two, the items which he is furnishing must be goods within the definition found in §520.31(1), F. S.

Section 520.31(1), F. S., defines "goods" as follows:

"Goods" means all personalty when purchased primarily for personal, family or household use, including certificates or coupons issued by a retail seller exchangeable for personalty or services. . . .

Our question is to determine whether or not doctors, dentists and other professional people are within the definition of "retail seller."

For the purpose of exemplification we will first consider an example of a dentist who makes a set of false teeth for a patient. It is true that the false teeth, after they have been made, are personalty and would remain personalty in the hands of the owner of said teeth. However, this office is cognizant of the fact that when an individual engages a dentist to manufacture for him a set of false teeth the individual is, in actuality, contracting for the skill and dexterity and experience of the dentist contracted with. This does not appear to be "goods" within the definition described in §520.31, F. S. It necessarily follows that such a professional man performing such activities would not be a retail seller within the provisions of §520.31(5), F. S., since the contract would not be one for the sale of goods, but would instead be one for the sale of personal services. Therefore, such a person would not be within the licensing requirements of §520.32(1), F. S.

In the case of *Lucas v. J. H. Gross Motor Car Co.*, 161 N.E. 362, we find a situation involving an advertiser's contract for signboard space. The court stated therein:

So-called personal contracts, or contracts in which the personalty [*sic*] of one of the parties is material, are not assignable. Whether the personalty [*sic*] of one or both parties is material depends upon the intention of the parties, as shown by the language which they have used, and upon the nature of the contract. 4 Page on Contracts (2d Ed.) §§2248-2251. See, also, 1 Williston on Contracts, §413; *American Smelting & Refining Co. v. Bunker Hill & Sullivan Mining & Concentrating Co.* [D. C.] 248 F. 172, 184, 185; and *Wooster v. Crane & Co.*, 73 N. J. Eq. 22 [66 A. 1093].

It is my opinion that such contracts involving doctors, dentists or other professional people would be in the nature of personal contracts calling for the skill of one particular doctor or dentist. They would not be contracts for the sale of goods, and would consequently not be within the purview of §520.32(1), F. S.

Similar situations have arisen under §4 of the Uniform Sales Act and §17 of the original Statute of Frauds. Clark on Contracts, 4th Ed., p. 133, points out that contracts where one contracts for work and labor in connection with materials are not within the Statute of Frauds, except where such contracts cannot be performed within a year. The theory is that such contracts are not contracts for the sale of "goods, wares or merchandise," but are in actuality contracts for the services of a particular person.

It is my opinion that a similar distinction can be made in the situations posed by your question.

In arriving at this conclusion I am not unaware that some question may arise due to the definition of "retail installment transaction" found in §520.31(6), F. S. This definition includes ". . . the furnishing of goods or services by a retail seller. . . ." This section appears to encompass

situations where a retail seller of goods also agrees to perform certain services with regard to the installation, modernization, repair, alteration or improvement of goods and also such situations where the sale of the goods ultimately becomes real property.

There is a fundamental rule of construction which is stated:

Where the language of a statute is plain and unambiguous there is no occasion for construction and the statute must be given effect according to its plain and obvious meaning. (82 C.J.S., Statutes, p. 577)

It is also stated that legislative intent should be determined from the outward manifestation of the legislature and should be found from the words which the legislature has sought to use and define in its enactments.

The legislature has clearly defined "retail seller" and limited its definition to "one selling goods." It has not seen fit to extend the definition of "retail seller" to one furnishing services. Therefore, we must assume that the legislature has not intended to so extend Ch. 520, F. S., to include doctors, dentists or other professional people transacting business in the manner described in your letter and in the manner posed by your question. The amending of this chapter to include doctors, dentists or other professional people would be a matter of legislative concern.

It should be pointed out however, that doctors, dentists or other professional people transacting business in the manner described would be within the purview of the usury laws of the state, to wit: Chapter 687, F. S., and should such persons charge interest rates in excess of those allowed by law such a person would be subject to prosecution for violation of §687.02, F. S.

067-2—January 10, 1967

TEACHERS' RETIREMENT SYSTEM

"EMPLOYMENT ON ANNUAL BASIS" CONSTRUCTION— INSTRUCTORS OF UNIVERSITY SYSTEM, MEMBERSHIP

To: K. D. Farris, Director, Teachers' Retirement System, Tallahassee

QUESTIONS:

1. Is a professor at Florida State University employed for the scholastic year of ten months, serving on other than a per annum basis as contemplated by §238.05(4), F. S.?

2. Are full-time professors and teachers at Florida State University required to be members of the Teachers' Retirement System by virtue of their appointment to a full-time teaching position?

The term "teacher" as used in the retirement system for school teachers includes "any member of the teaching or professional staff and any certified employee of . . . tax supported institution of higher learning of the state . . ." and also seems to include "any full time employee of any nonprofit professional association or corporation of teachers functioning in Florida on a state-wide basis. . . ." (§238.01(4), F. S.) The limitation "full time employee" used in said subsection (4) seems to refer to employees of nonprofit professional or corporation teacher members, which limitation does not appear to be specifically applicable to other persons. Section 238.01(14), F. S., defines "earnable compensation" as "the full compensation payable to a teacher working the full working time of his position," which seems to indicate that the working year of a school teacher may not always be a full twelve-months' period.

The full working time of a schoolteacher during a twelve months period may not, in some instances, exceed a nine or ten months working term. Section 228.041(19), F. S., provides that: "The school year shall comprise the period during which the schools are regularly in session for the minimum number of one hundred eighty days for pupils plus periods for pre-school and post-school conferences during any school fiscal year beginning on or after July 1 and ending on or before June 30"; We have specifically examined §§238.01(4), 238.05(1) (b), as well as §238.05(4), F. S., mentioned in your letter of Oct. 19, 1966.

It appears from §122.02(1), F. S., that state and county officers and employees, within the purview and intention of Ch. 122, F. S., which chapter is the controlling statute for the state and county officers and employees retirement system, are limited to "full-time officers or employees who receive compensation for services rendered from state or county funds." The phrase "full-time officers or employees," used in Ch. 122, F. S., is not used with reference to Ch. 238, F. S., as in said Ch. 122, F. S. The term "full-time officers or employees" seems to be used in §122.02, F. S., when referring to Ch. 122, F. S., and appears to refer to full-time employment (that is, twelve months periods, subject to annual leave with pay); while §238.01, F. S., when referring to Ch. 238, F. S., seems to refer to the full-time working period for teachers, which may not exceed a period of ten months which is sometimes referred to as a school year. Chapter 122, F. S., seems to contemplate a twelve months working period, while a ten months working period will suffice for Ch. 238, F. S.

The term "teacher" as used in Ch. 238, F. S., refers to the teaching staff of the numerous schools and institutions therein mentioned, including specifically the "teaching or professional staff of . . . any tax supported institution of higher learning of the state (of Florida)" which specifically includes the teaching staff of the several institutions of higher learning of the State of Florida, which includes the Florida State University. All teachers in the public schools, and in the Florida institutions of higher learning, with the exceptions mentioned in §238.05-(1) (a), (b), F. S., are required to become members of the retirement system for school teachers, provided for by Ch. 238, F. S.

In the light of the above and foregoing observations, the questions posed above are answered as follows:

AS TO QUESTION 1:

When §238.05(4), F. S., is read in connection with and in the light of other provisions of Ch. 238, F. S., I am inclined to the view that the "per annum basis" mentioned in said subsection (4) is a ten months school year minimum, so that a ten months service will meet the requirements of Ch. 238, F. S., although retirement pay will be based on the actual time served by the teacher.

AS TO QUESTION 2:

The second question is answered in the affirmative unless within §238.05(2), F. S.

067-3—January 12, 1967

ESTATES OF DECEDENTS

ADMINISTRATION—ATTORNEY'S FEES, PETITION

To: *James C. Gwynn, County Judge, Tallahassee*

QUESTION:

Must an attorney of a personal representative of a decedent's estate apply by petition and secure an order of the probate court on the matter of fees?

This question is answered in the negative.

Initially it should be pointed out that there are two situations when an attorney may be entitled to compensation for services rendered in connection with probating an estate. Situation (1) is where the attorney is retained by an heir or some person seeking to establish a claim or other interest from the estate. Situation (2) is where the attorney is retained by the personal representative.

Your question contemplates situation (2). However, in order to clearly answer your question, situation (1) must be discussed briefly. In this situation, the attorney must show that his services benefited the estate. This situation may arise where the person or heir employing the attorney is contesting the validity of a will. It may be that he is contesting the competency of the testator or the legal efficacy of the will. In such situations, there would be no way for this attorney's fees to be included as an item of expense in either the annual or final accountings of the personal representative, since the attorney had not been hired by the personal representative. Accordingly in these situations, it would be necessary to petition to the court for approval of the attorney's fees. This would then present the question to the judge to determine whether or not the services rendered had provided a benefit to the estate. At the same time the judge would also pass upon the reasonableness of the fee. This is one of the situations which appears to be covered by §734.01(2), F. S.

An example of a case involving such a situation is *In Re Graham's Estate*, 23 So.2d 485.

The situation contemplated by your question is where the attorney is retained by the personal representative. In this situation, the personal representative binds himself personally with the attorney. The personal representative is then reimbursed from the estate at the annual or final accounting. At this time, the probate judge determines the need for the services and the reasonableness of the fee charged. In such situations, it would not normally be necessary for the attorney to petition the probate court to have his fees allowed. The attorney's fees would already be included as an item of expense submitted by the personal representative at the annual or final accounting. Should the judge for any reason disallow the attorney's fees or should the personal representative fail to include the attorney's fees as an expense item, then the attorney could petition the probate court to have his fees allowed. This situation is also contemplated by §734.01(2), F. S.

The conclusions which have been reached are reinforced by certain fundamental rules of construction, that which is found in the Florida Statutes, and the general law as stated in 39 C.J.S., §§199-223.

Section 734.01(2), F. S., uses the words "may apply to the court by petition." This is clearly permissive, not mandatory. The fundamental rule of construction is that the legislature intended that words used in acts be given their ordinary meanings.

Section 734.01(1), F. S., provides that a personal representative shall be allowed all necessary expenses and attorney's fees paid in the care and management of the estate. Section 734.01(3), F. S., provides in effect that the personal representative shall be entitled to a credit for such reasonable sums as he may have paid for the services rendered to the estate by an attorney in his annual and final returns. It further points out that objections may be made to the allowance of such items as in other cases.

33 C.J.S. §§199-223, point out that the personal representative and not the estate is directly liable to one, such as an attorney employed by him to perform services; that the executor or administrator makes himself personally liable to such attorney and reimburses himself in his

accounts subject to the court's allowance; and such reasonable attorney's fees are allowed as expenses of administration and are not paid from the assets of the estate by virtue of the contract of employment between the attorney and personal representative.

Reasoning from the above and foregoing, it is my opinion that it is not mandatory that an attorney who has contracted with a personal representative petition to the court for an order making allowance for attorney's fees.

In further support of this conclusion, see *In Re Paine's Estate*, 174 So. 430, and *Brickell v. McCaskill*, 106 So. 470.

It should be pointed out in passing that the better procedure would be for the personal representative and the attorney to be employed by the personal representative to obtain prior approval from the probate judge before entering into a contract of employment. This would serve to avoid later controversy which might arise.

Attorney General's Opinion 065-74 is withdrawn accordingly.

067-4—January 12, 1967

TAXATION

MUNICIPAL TAXES—ASSESSMENT AND COLLECTION BY COUNTY OFFICIALS— DISPOSITION OF FEES PAYABLE THEREFOR

To: *Ernest Ellison, State Auditor, Tallahassee*

QUESTION:

How, for what purpose and to whom are the moneys due, or to become due, under §8, Ch. 61-1917, as amended by Ch. 65-708, Laws of Florida, and like and similar laws, for the assessment and collection of municipal taxes assessed on the county tax roll, payable and in what portions or amounts?

It seems evident from said Ch. 61-1917, that it was adopted and enacted by the legislature under and pursuant to §22, Art. VIII, State Const., the purpose of such legislation being the consolidation of municipal and county taxation and collection on the same tax roll. The purpose of said §22, Art. VIII, State Const., and statutes and laws adopted under and pursuant thereto, is the consolidation of county and municipal taxation, by statute, to the same extent that consolidation of such tax assessment and collection was accomplished by §§12-21, Art. VIII, of the State Const. These sections and their implementing acts of the legislature may be resorted to when construing said Ch. 61-1917, in arriving at legislative intent.

It is provided in and by said §8, Ch. 61-1917, as amended by Ch. 65-708, that the tax assessor and tax collector respectively "shall be allowed and paid by each municipality whose taxes are assessed and collected upon such (county) tax assessment rolls, a sum of money not to exceed the amount provided for collection and assessment of county taxes in §193.65(2), F. S., to be agreed upon by the county tax collector and assessor and the municipalities. Such sums of money shall be paid to each official at the time and in the manner provided by the general laws relating to county taxation wherein the commissions of the county tax assessor and county tax collector are provided for. Twenty-five per cent of such amount due each officer shall be used to defray the additional expense of assessing and collecting the taxes of such municipalities and in reimbursement for such expense and seventy-five per cent shall be used as compensation for such officer." (Parenthetical matter added.)

This language bears a close relation to that used in §7, Ch. 22782, 1945, relating to Hillsborough County; §7, Ch. 25712, 1949, relating to Broward County; §7, Ch. 26160, 1949, relating to Pinellas County; §7, Ch. 26473, 1949, relating to Volusia County, etc. There is such a similarity between these provisions for taxing officer compensation, and that in said §8, Ch. 61-1917, as amended by Ch. 65-708, as suggests a uniform purpose and intention and legislative purpose.

It is provided in the latter part of §193.65(4), F. S., that:

All commissions for assessing and for collecting special tax district taxes shall be paid at the time and in the manner now or as may hereafter be provided for the payment of the commissions for the assessment and for the collection of county taxes. All amounts paid as compensation to any tax assessor or to any tax collector under the provisions of this or any other law shall be a part of the general income or compensation of such officer for the year in which received and nothing in this section contained shall be held or construed to affect or increase the maximum salary as now provided by law for any such officer. (Emphasis supplied.)

This provision must be taken into consideration when considering §8, Ch. 61-1917, as amended by Ch. 65-708, hereinafter discussed.

Said §8, Ch. 61-1917, as amended by Ch. 65-708, does not appear to be a new or novel provision in our laws. I am of the opinion that the legislative intention was that the compensation payable to the taxing officials be deemed income of the office, as are fees by §193.65, F. S., for the assessment and collection of county, school and district taxes. The 25% of such compensation, mentioned in the statute, has the appearance of a division of the compensation into general office expense and operating expenses, with the 25% being allocated to general office expense and the 75% being allocated to current operating expense. I do not find in said section as amended any intention to provide the taxing officials with compensation in excess of that provided for in §§145.10 and 145.11, F. S.

067-5—January 27, 1967

MOTOR CARRIERS

TRANSPORTERS OF MOTOR VEHICLES IN INTERSTATE AND INTRASTATE COMMERCE, SUBJECTIVITY TO LICENSING REQUIREMENT OF CH. 323, F. S.

To: *Richard E. Gerstein, State Attorney, Miami*

QUESTION:

Is a corporation which conducts the business of arranging for, obtaining, or providing drivers to transport motor vehicles owned by others, as a drive-away service, to interstate or intrastate destinations a motor carrier or a transportation broker under Ch. 323, F. S., and, if so, does it have to obtain a license or certificate of public convenience and necessity as required by law?

In an effort to answer your question and its many facets, your attention is directed to the introductory paragraph of §323.03, F. S., which provides, in part:

Common carriers; certificate of convenience required.—No motor carrier shall operate any motor vehicle for the transportation of

persons or property as a common carrier for compensation on any public highway in this state without first having obtained from the public service commission a certificate that public convenience and necessity requires such operation.

It would appear from the foregoing broad definition of a common carrier that a corporation engaged in the activities described in your question does assume the characteristics or burdens of the transportation business and would be a common carrier within the purview of the Florida law; and would therefore, have to obtain from the Public Service Commission a certificate of public convenience and necessity required of such operation. In the particular instance the corporation would be engaged in the transportation of property as a common carrier for compensation upon the public highways of this state. A motor vehicle is classified as personal property in §13, Art. IX, of the State Const., and if it is transported for compensation it would fall within the purview of §323.03, F. S.

By the same token, if a corporation engaged in the activity described by you is to be considered as a common carrier within Ch. 323, F. S., then it would not be classified as a transportation broker within the meaning of §323.31, F. S.

Parenthetically, corporations engaged in the activity described by you in your question have been classified as "common carriers by motor vehicle" within the provisions of 49 U.S.C., §303(14) of the Interstate Commerce Act pertaining to transportation. (See *I.C.C. v. A.A.A. Con Drivers Exchange, Inc.*, C.A. N.Y. 1965, 340 F.2d 820, *cert. den.* 85 Sup. Ct. 1533, 381 U.S. 911, 14 L. Ed. 2d 433; *I.C.C. v. Interstate Auto Shippers, Inc.*, D.C. N.Y. 1963, 214 F. Supp. 473; *I.C.C. v. Dudgeon*, D.C. Cal. 1961, 213 F. Supp. 710, *cert. den.* 83 Sup. Ct. 1015, 372 U.S. 960, 10 L. Ed. 2d 13.

With respect to the interstate or intrastate aspect of your question, I would make the following observations:

A carrier operating exclusively interstate is subject only to acts of congress and regulations of the Interstate Commerce Commission thereunder. *Tucker v. Casualty Reciprocal Exchange*, D.C. Ga. 1941, 40 F. Supp. 383. But in the absence of congressional action, state regulation of intrastate carriers is not invalid because of its effect upon interstate commerce. *Kendall v. Teche Lines*, La. App. 1940, 197 So. 810.

The Florida Legislature has apparently recognized the paramount regulation by the Interstate Commerce Commission of common carriers engaged exclusively in interstate commerce and has provided for certificates of registration in §323.28(1)-(3), F. S., which state, substantially, that it will be unlawful for any motor carrier transporting for compensation in interstate commerce in Florida when a certificate of public convenience and necessity or a permit is required from the Interstate Commerce Commission to operate over the public highways of this state without first having filed a certified copy of such Interstate Commerce Commission authority with the Florida Public Service Commission and having obtained from said commission a certificate of registration. The foregoing section of law also provides that applications for certificates of registration properly filed on forms provided by the Florida Public Service Commission will be granted as a matter of course.

In view of the foregoing comments, it would appear that if a corporation engages in a drive-away service to interstate or intrastate destinations in a continual business operation for profit, then it must be considered as a common carrier within the meaning of 49 U.S.C. 303(14) and within the meaning of §323.03, F. S.

067-6—February 3, 1967

UNIFORM COMMERCIAL CODE

FILING OF DOCUMENTS, RESPONSIBILITIES AND DUTIES OF THE CLERK OF THE CIRCUIT COURT

To: James C. Robinson, County Attorney, Orange County, Orlando

QUESTIONS:

1. Should a clerk refuse to accept for filing a document which does not meet the requirements of §679.9-402, F. S.?

2. May a clerk refuse to accept and file a financing statement where the signature of the debtor or secured party is illegible and the names are not printed, typed or legibly written elsewhere on the statement?

3. Should a clerk accept for filing a financing statement if the signature of either party is a carbon copy rather than original signature?

4. Should a clerk file a financing statement if it is an uncertified photo copy of such a statement which appears to have been properly signed by both parties?

5. Does the clerk have a duty to furnish up-to-the-minute information as to the current status of any financing statement or other security agreement on file?

AS TO QUESTION 1:

Traditionally, clerks of the circuit courts have been considered ministerial officers, *Pan American World Airways v. Gregory*, 96 So.2d 669, whose duties include the responsibility to accept documents for filing without the necessity of examining their content for legal correctness. In this case the Uniform Commercial Code appears to permit substantial compliance and permits a valid filing even where there are minor errors, see §679.9-402, F. S. The clerks have no duty, responsibility or authority to act as policemen under the code for it imposes no additional duty or responsibility upon the clerks to examine an instrument to determine if the requisites of the statutes have been met except that §201.22, F. S., requires the clerk to insure that the instrument contains a statement to the effect that the documentary stamp tax has been paid. See answer to question 4 of AGO 066-52.

Question 1 is therefore answered accordingly.

AS TO QUESTION 2:

It is a general rule of statutory construction to construe statutes so as to give them a practical operation and effect. See *Latham v. Hawkins*, 121 Fla. 324, 163 So. 709.

Part IV of the Uniform Commercial Code found in §§679.9-401, F. S., *et seq.*, is a notice statute. See *Florida Study and Comments, Uniform Commercial Code*, published by The Florida Bar (1966), p. 163, §9.41, and p. 166, §9.44 citing official code comment 9-402. Any practical interpretation of a "notice statute" would seem to require that the information, including signatures, contained thereon be legible so as to put anyone to whose attention the document might come on notice as to the nature of transaction and the parties involved. In addition, it would as a practical matter be impossible for a clerk to properly index the instrument if he could not ascertain the names of the parties thereto.

It should, however, be pointed out in passing that the debtor's signature is unnecessary on a statement covering proceeds only, see *Florida Study and Comments, Uniform Commercial Code*, *supra*, p. 167, citing §679.9-402, F. S. The debtor's signature is likewise unnecessary where

the financing statement is already on file in another jurisdiction. Under these circumstances an illegible debtor's signature or the absence of one would not affect the filing.

Except for the situations just mentioned, the signatures should be legible or else the names of the parties should be legibly printed or typed on an instrument before a clerk could be required to accept, index and file it under the provisions of the Uniform Commercial Code.

AS TO QUESTION 3:

There appears to be no question that an originally signed carbon copy of a document is acceptable for filing (see AGO 063-108 and 066-52, question 3). It is to be noted, however, that signatures on documents filed under the uniform commercial code are entitled to recordation "without oath, acknowledgment or proof of its execution." (See §679.9-4011, F. S.) In light of the observations in the answer to question 2 above it would appear the safer course of action for the clerk to file such document where it is tendered for filing since the failure to accept and file it might jeopardize priority rights in the event such a document was later held to constitute a proper filing in an appropriate proceeding in a court of competent jurisdiction. In such event it may well be that a clerk could suffer liability for any damages resulting from the loss of priority rights stemming from the refusal of the clerk to file the previously tendered instrument.

Question 3 is answered accordingly.

AS TO QUESTION 4:

The answer to question 3 above would appear to be applicable to this question.

AS TO QUESTION 5:

Section 679.9-407(2), F. S., requires the filing officer to issue to any person who has tendered the proper fee a certified copy of any instrument filed under the code. The primary purpose of this provision is to provide a convenience for those persons who wish to know what the central files in the state capitol contain without the necessity of personally inspecting said files. This section does, however, appear to be likewise applicable to clerks of the courts. In substance, however, the code does not require the clerk to furnish any more information about security agreements or financing statements than he is obligated to furnish about any other records on file in his office. Since Part IV of the code is, as indicated above, a notice statute, it places upon interested parties the burden of making inquiry concerning these documents. Where a proper request is accompanied with the necessary fee the clerk is, under the provisions of §679.9-407, F. S., required to furnish a certified copy of any instrument filed under the code. The fee for such service shall be as provided for in Ch. 28, F. S.

Question 5 is answered accordingly.

067-7—February 9, 1967

STATE FIRE MARSHAL

DEPUTY STATE FIRE MARSHALS, APPOINTMENT, POWERS
AND DUTIES, CONSTRUCTION OF CH. 61-942, LAWS OF
FLORIDA (BREVARD COUNTY)

To: *Broward Williams, State Fire Marshal, Tallahassee*

QUESTIONS:

1. Is a district fire chief appointed under the provisions of Ch. 61-942, Laws of Florida, an ex officio deputy state fire marshal under §633.121, F. S.?

2. If a fire prevention bureau were established under the direction and supervision of a valid ex officio deputy state fire marshal, would the members of this bureau have the same rights to enter premises for deputy state fire marshal? These powers are outlined in §§5A-3.02-5A-3.07, Rules and Regulations of the State Fire Marshal, State of Florida.

3. Has an ex officio deputy state fire marshal the power to require that anyone starting an outdoor bonfire, rubbish fire or land clearing fire in his assigned district first obtain a burning permit issued by the ex officio deputy fire marshal?

4. Would a district fire chief who is a valid ex officio deputy state fire marshal be entitled to travel expenses or other emoluments paid from tax moneys authorized in Ch. 61-942, Laws of Florida, filed by the Secretary of State, May 4, 1961?

AS TO QUESTION 1:

Question 1 is answered in the affirmative, subject to qualification by reason of a possibly different factual situation from that presumed in the following answer.

Chapter 633, F. S., delineates the powers and duties of the insurance commissioner as state fire marshal. In the initial section of the chapter he is required to enforce "all laws and provisions of this chapter" relating to nine categories that deal with fire and its prevention.

He is assisted in his duties by deputy state fire marshals, whom he appoints. He is required to investigate "the cause, origin, and circumstances of every fire occurring in this state wherein property has been damaged or destroyed where there is probable cause to believe that the fire was the result of carelessness or design." Reports of all such investigations are to be made on forms furnished and approved by the state fire marshal, and such reports are to be kept in his office.

The authority given the fire marshal may be exercised by him through his deputies.

By virtue of §633.121, F. S., "Chiefs of fire departments (and mayors of municipalities having no organized fire departments) shall be ex officio deputy fire marshals and shall make similar reports on forms to be furnished by the insurance commissioner" as state fire marshal.

It is evident accordingly that all chiefs of fire departments in the state are by virtue of their office also constituted as deputies to the state fire marshal, to assist him in his duties and to provide him with reports as to those fires on which reports are required to be made. The term "chiefs of fire departments" is not otherwise defined in the statutes, and hence what constitutes a "fire department" must be determined by the common meaning and understanding of this word—namely, an organized group of fire fighters possessing at least the basic fire-fighting equipment commonly used to combat fires under present-day conditions. Whether or not a particular operation would qualify as a fire department, accordingly, would necessarily be a matter of judgment and could be determined only by an inspection of each.

Chapter 61-942, Laws of Florida, is a population act which presently applies only to Brevard County. The act authorizes counties coming within its purview to establish and maintain "fire control units" within the counties or to set up "district fire control units," each district to embrace any commissioner's district.

Such fire control units are to be staffed by volunteer firemen. There is a provision for the employment by the county of a chief for such county or district fire control units, who is to be paid such compensation as may be agreed to by the commissioners.

You ask if such a chief of a district or county fire control unit is the "chief of a fire department" as the term is used in §633.121, F. S. above, so as to be also an ex officio deputy state fire marshal.

Sections 125.25-125.29, F. S., are statutory provisions relating to county fire control units, and there is a strong suggestion that, as the term is used in these sections, the legislature at the time of passage of these provisions in 1935 contemplated that these county units would be occupied with protecting our forests and timber areas in largely unpopulated sections of the county.

However, it seems evident that with the increase in population in this state since 1935 the areas protected by such fire control units will invariably contain some residences, commercial buildings and other structures and that human lives will thus be exposed to the peril of fire, and that such county or district fire control units will of necessity be called upon to fight residential and other structural fires.

It would appear to me that the state fire marshal, in view of his duties under Ch. 633, F. S., would need the assistance of the chiefs of such county or district fire control units in some or all of the nine categories of activity listed in §633.01, F. S., and particularly would be interested in receiving reports as to fires involving homes, buildings and loss or imperilment of life.

Presuming accordingly that there are residences and other buildings within the fire control districts actually set up in Brevard County under the foregoing population act, it would be my opinion that the chief of such a district fire control unit would be the chief of a fire department, and hence an ex officio deputy state fire marshal under §633.121, F. S.

This conclusion appears to be reinforced by the provisions in Ch. 61-942, Laws of Florida, which permit a tax levy to purchase implements and fire-fighting equipment and which provide that the unit shall be manned by volunteers denominated as county or district firemen.

There might in fact, of course, be situations where the fire-fighting equipment and implements possessed by such a fire control unit would be so primitive and the volunteers so few in number that it could not be considered a fire department in the usual understanding of the word. However, this possibility seems remote under present conditions.

AS TO QUESTION 2:

Question 2 refers to a "fire prevention bureau," which is otherwise undefined. Since ex officio deputy fire marshals are the chiefs of fire departments, the mayors in municipalities having no organized fire department and the chiefs of fire control units (as commented on in the preceding answer to question 1), it appears that you are referring to a fire prevention bureau which is an adjunct of a city fire department, a bureau possibly set up under the direction of a mayor where there is no department or under the direction of a chief of a fire control unit.

It is evident that Ch. 5A-3 of the Rules of the State Fire Marshal, being general provisions dealing with fire prevention, contemplates inspection of buildings and premises in populated areas.

In furtherance of such inspection, §5A-3.03 authorizes the state fire marshal or his deputy to enter at a reasonable hour any building or premises for inspection purposes. Excluded from inspection are the interiors of dwellings, as noted in §5A-3.04.

This right of inspection is given solely to the state fire marshal and his deputies, the latter term embracing ex officio deputies as explained previously. There is no provision in the said rules for inspections of premises and buildings by the members of a fire prevention bureau merely by reason of the fact that such bureau may be under the direction and supervision of an ex officio deputy fire marshal.

To have such power such members of a fire prevention bureau would

have to derive their authority from some other source. Question 2 is answered in the negative.

AS TO QUESTION 3:

Question 3 deals with the power of an ex officio deputy fire marshal to require a burning permit before the starting of an outdoor bonfire, rubbish fire or land clearing fire in the area under the authority of such deputy.

Chapter 633, F. S., makes no reference to starting outdoor bonfires, rubbish fires or land clearing fires, nor does it contain any requirement that a permit therefor must be obtained from anyone.

Section 5A-28.01, of the Rules of the State Fire Marshal, dealing with fire prevention and precautions against fire in general, purports to prohibit bonfires and rubbish fires on private lands unless the location is not less than 50 feet from any structure and adequate provision is made to prevent any such fire from spreading to within 50 feet of any structure. Such fires are permitted up to within 15 feet of a structure if contained in an approved waste burner. The section also provides that such fires must be attended by a competent person until the fire is extinguished, and such person must have at hand a garden hose connected to a water supply or other fire fighting equipment available. The fire marshal is also authorized to prohibit bonfires and outdoor rubbish fires when atmospheric conditions or local circumstances make such fire hazardous.

Section 633.01 F. S., requires the state fire marshal to "... enforce all laws and provisions of this chapter relating to" nine hazardous situations involving fire and protection against or prevention of fires. The broadest area of his duties is the "prevention of fires." He is required thus to enforce all laws and provisions of Ch. 633, F. S., relating to the prevention of fires. However, there are no provisions in Ch. 633, F. S., relating to outdoor bonfires, rubbish fires or land-clearing fires.

The rule-making power of the state fire marshal appears to extend solely to matters dealt with in Ch. 633, F. S., since there is a repeated reference to regulations "of the state fire marshal issued hereunder," meaning under the provision of Ch. 633, F. S.

Thus I fail to find in Ch. 633, F. S., and the rule-making authority of the state fire marshal arising therefrom any provision which permits the fire marshal to make regulations or rules relating to outdoor bonfires, rubbish fires or land-clearing fires.

Accordingly, if the state fire marshal himself is without this power, it could not be possessed by an ex officio deputy fire marshal by virtue of Ch. 633, F. S.

Furthermore Ch. 590, F. S., contains many provisions regulating setting fire to grasslands and other described terrain, and contains further provisions which do not harmonize with the provisions contained in Rule 5A-28.01 above. Section 823.02, F. S., makes it a penal offense to build a bonfire within 10 rods or approximately 165 feet of any house or building. This provision is inconsistent with Rule 5A-28.01, which purports to permit under certain restrictions fires up to much lesser distances.

In the absence of further statutory authority to issue rules and regulations relating to outdoor bonfires, rubbish fires or land-clearing fires, it is my opinion that neither the state fire marshal nor his deputies have any power to regulate such fires by virtue of Ch. 633, F. S.

AS TO QUESTION 4:

Question 4 asks if the chief of a fire control district under Ch. 61-942, Laws of Florida, would be entitled to travel expenses or other emoluments to be paid from the tax money referred to therein.

Your question presumes that such chief is also an ex officio deputy fire marshal, as discussed in question 1 above.

I find no authority in the language of the act which would permit the payment of travel expenses or other emoluments to the district chief provided for therein.

067-8—February 14, 1967

**PUBLIC DEFENDERS—ASSISTANT PUBLIC DEFENDERS
REPRESENTATION OF INSOLVENT DEFENDANTS IN CAPITAL
CASES PURSUANT TO §909.21, F. S.—PRACTICE OF
CRIMINAL LAW**

To: Jackson Bryan, Assistant Public Defender, Palatka

QUESTIONS:

1. Is the public defender or an assistant public defender eligible for appointment to represent an insolvent defendant in a capital case under the provisions of §909.21, F. S.?

2. If the answer to question 1 is in the affirmative, may the county compensate the public defender or the assistant public defender in accordance with the terms of said §909.21, F. S.?

AS TO QUESTION 1:

Section 909.21, F. S., which has been in force ever since 1939, provides as follows:

909.21 Appointment of counsel in capital cases.—In all capital cases where the defendant is insolvent, the judge shall appoint such counsel for the defendant as he shall deem necessary, and shall allow such compensation as he may deem reasonable, such sum to be paid by the county in which the crime was committed. Counsel, so appointed, may in the event of conviction and sentence of death, appeal the case to the supreme court, and prosecute said appeal to its final conclusion with diligence; and until the supreme court has disposed of the appeal, no compensation shall be allowed to such counsel. If counsel first appointed is unable for any reason to perfect and prosecute the appeal, the court may relieve him from such duty, but shall appoint other counsel for such purpose. When counsel so appointed by the court, in capital cases, completes the duties imposed by this section, such counsel shall file a written report as to the duties performed by him and apply for discharge by the court.

The compensation of counsel for the defendant, at the trial, shall not exceed five hundred dollars; and defendant's counsel's compensation on appeal, shall not exceed five hundred dollars additional.

Since provision had already been made by this statute for counsel for insolvent defendants in capital cases, the public defender law, §§27.50-27.58, F. S., enacted in 1963, did not require the public defenders to represent such defendants. It required them to represent insolvent defendants in noncapital felony cases and provided in §27.51(3), F. S., as follows:

(3) The public defender shall give priority and preference to his duties under the provisions of this act and may engage in the private practice of law only to the extent that it will not interfere with or prevent performance of his duties as public

defender and shall not otherwise engage in the practice of criminal law. (Emphasis supplied.)

As did my predecessor in office, Hon. Richard W. Ervin, in his opinion 063-81, I hold the opinion that said statutory provision prohibits a public defender from engaging in the practice of criminal law otherwise than in his official capacity as public defender. If a public defender should accept an appointment to defend an insolvent defendant in a capital case, pursuant to §909.21, F. S., he would be engaging in the practice of criminal law otherwise than as public defender and therefore he is not eligible to accept such an appointment.

However, the situation is different insofar as an assistant public defender is concerned. I find nothing in the public defender law which says or even intimates that an assistant public defender may not practice criminal law otherwise than in his capacity as assistant public defender. I think that if the legislature had intended to prohibit an assistant public defender from engaging in the private practice of criminal law, it would have said so. In this connection, I note that §454.18, F. S., prohibits the sheriff and clerk, "or deputy of either," from practicing law. (Emphasis supplied.)

Therefore, I am of the opinion that an assistant public defender may properly accept an appointment under §909.21, F. S., to represent an insolvent defendant in a capital case if so doing will not interfere with the proper performance of his duties as assistant public defender.

AS TO QUESTION 2:

Since question 1 has been answered in the negative insofar as the public defender is concerned, it is not necessary to answer question 2 as to him.

As to an assistant public defender who accepts an appointment under §909.21, F. S., I see no reason why he may not be compensated by the county in accordance with the provisions of said section.

You will note that §909.21, F. S., provides that counsel appointed thereunder may in the event of conviction and sentence of death appeal the case and receive compensation for doing so. This does not furnish authorization for counsel appointed thereunder to take an appeal where the death sentence is not imposed. It is my opinion that if the defendant is convicted of a crime for which a sentence less than death is imposed, then the case becomes a noncapital felony case and the public defender or, for that matter, any one of his assistants, would not be disqualified from representing the defendant on appeal.

067-9—February 22, 1967

BANKS AND BANKING

RETAINED TITLE CONTRACTS FOR SALE OF PERSONAL PROPERTY TRANSFERRED WITHOUT RECOURSE—§659.17, F. S.

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

In determining the requirements placed on banks in §659.17(1), F. S., should the purchase by a bank of retained title contracts without recourse be considered as a loan within the intent, purpose and limitations of said section?

I gather from your file handed me with your request for opinion, dated Aug. 18, 1966, that the Commercial Bank at Daytona Beach, Florida, has acquired, by endorsement or assignment without recourse, certain retained title contracts for the sale of tangible personal property.

One of the powers of Florida banking institutions is the making of loans; another is investing its funds, and other banking transactions. In the particular case mentioned in your letter of August 18, 1966, a banking institution, organized and existing under the statutes and laws of Florida, obtained from a motor vehicle dealer doing business in the state, numerous retail installment contracts, representing sales of motor vehicles to individual and corporate purchasers, probably on the basis of installment payments which will pay out sometime in the future. It further appears from the file before me that the assignments or endorsements of these contracts from the motor vehicle dealer to the bank, include the following:

For value received the within contract, and the property therein described, and all right, title and interest of the undersigned dealers are hereby sold, assigned and transferred to _____ (name and address of the banking institution) and its successors and assigns without recourse. . . . (Emphasis supplied.)

A banking institution taking an assignment, such as that set out above, takes title to the instrument, without being liable for the payment of the same, should the maker thereof default and fail to pay the same. We are here dealing with a specific assignment or endorsement of an obligation to pay money, made under the express condition that should the maker fail to pay the same that person to whom the assignment or endorsement was made may not enforce the same against such assignor or endorser. The bank does not hold the same as security for the repayment of the consideration paid for the assignment, there being no such obligation to pay.

The answer to the above-stated question must be in the negative; the transaction was a transfer of title, without recourse, to the bank and not a loan by the bank secured by the retained title contract.

067-10—February 23, 1967

CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL DISTRICT

USE OF FUNDS REALIZED FROM IMPOSITION OF AD VALOREM TAXES

To: *Wallace W. Henderson, State Budget Director, Tallahassee*
QUESTIONS:

1. May the Central and Southern Florida Flood Control District use any funds available to it, from ad valorem taxes to pay part or all of the costs of constructing the works of the district, for acquisition of lands for water storage areas, for highway bridge construction, for purchase of flowage easements, for purchase of water storage easements or for the mitigation of damages from overflow damages due to district works?

2. What disposition should be made of district funds deposited in connection with a suit in eminent domain for right-of-way lands, deposited during one year or biennium but released by the court during a subsequent year or biennium?

A study of §§378.20-378.28, F. S., seems to bring me to the conclusion that the taxes provided for in said sections are an assessment for special benefits instead of an ad valorem tax; however, §3, Chs. 25214 and 25270, Laws of Florida, 1949 (identical chapters), for the purpose of maintaining, operating and administering the said Central and South-

ern Florida Flood Control District, authorize, "... the levy annually of a uniform ad valorem tax on all property in the district as determined for county taxing purposes, not to exceed the amount necessary to provide the money determined to be necessary for the purpose of maintaining, operating and administering such district and obtaining the necessary rights-of-way for such district, provided such tax shall not exceed an annual rate of one mill on the dollar on the assessed value of such property. . . ." This law (Chs. 25214 and 25270, 1949) was designed primarily for the construction and operation of the works of the district as a district and not a state and federal purpose. Such was also the primary plan of Ch. 378, F. S. Although this seems to have been the primary plan of such laws, they did not prohibit the accomplishing of flood control within the district by and through the joint efforts of the federal government, the state and the said district.

A study of said Chs. 25214 and 25270, 1949, relating to the Central and Southern Florida Flood Control District, together with Ch. 378, F. S., and construing them together, in the light of applicable federal statutes and laws, (see AGO 052-198, of June 25, 1952) leads to the conclusion that the operations of the said Central and Southern Florida Flood Control District is a joint federal and state project, which fact should be taken into consideration in disposing of the two above-stated questions. The expenditures by or for the said Flood Control District appear to be from two separate sources, one from appropriations from the general revenue fund of the state (items 323 and 324, §1, Ch. 65-135, Laws of Florida) and from taxes derived from ad valorem taxes imposed under and pursuant to §3, Chs. 25214 and 25270, 1949, the proceeds of such taxes being paid to the district by the tax collector.

Under §282.081, F. S., unexpended balances of appropriations for salary of the positions specifically named in an item in the appropriations acts for any fiscal year reverts to the fund from which appropriated and is available for reappropriation. However, the unexpended balances of all other appropriations, including lump sum appropriations and continuing appropriations, as reflected in the records of the comptroller, may be used for a like purpose in the second fiscal year of the biennium, but any balance of any such appropriation remaining unexpended at the end of the biennium, and not within §282.081(2) or (3), reverts to the fund from which appropriated and be available for reappropriation. Said §282.081, F. S., seems to relate to appropriations from the state treasury. Said §282.081, F. S., does not appear to have any application to the ad valorem taxes imposed and collected under and pursuant to §3 of Chs. 25214 and 25270, 1949, which section related to district or local taxes and not state taxes.

Said §3 of Chs. 25214 and 25270, 1949, provide for the imposition of district or local ad valorem taxes on lands within the Central and Southern Florida Flood Control District, for flood control district purposes, "for the purpose of maintaining, operating and administering such district and obtaining the necessary rights-of-way for such district," which ad valorem tax may not exceed "one mill on the dollar on the assessed value of such property." This amounts to an appropriation of the tax moneys so imposed on the lands of the district for the purposes of maintaining, operating and administering the works of the said district. Said §3, of Chs. 25214 and 25270, 1949, would justify a full affirmative answer to the first above question, except for the cooperative agreement by and between the United States and the State of Florida concerning the establishment, operation, maintenance and administration of the district and its works.

Beginning with an act of Congress of June 22, 1936, through numerous subsequent acts of Congress, including 33 U.S.C.A. 701-709, the

Congress of the United States has provided for the cooperation in flood control projects by and between the United States and the several states subject to floods within the above statutes and laws, pursuant to which contracts have been entered into by and between the United States, the State of Florida and the Central and Southern Florida Flood Control District, of the said State of Florida, containing the administration and operation of the flood control works within the said district. In general and in substance, the expenses of the operations and works of the said district are shared by and between the United States and the State of Florida and its Central and Southern Florida Flood Control District, in accordance with the agreements by and between the United States, the State of Florida and its Central and Southern Florida Flood Control District.

Should the Central and Southern Florida Flood Control District, either by itself or in conjunction with the State of Florida and the United States, in their flood control operations cause the works of the district to back water onto the lands of others, without their consent or permission, doubtless there would be a taking (temporary at least) of such lands within the purview of §§28 and 29, Art. XVI, of the State Const. Such a violation of the rights of others would doubtless be actionable under said sections and article of the State Const.

Question 1 should be answered in the affirmative, subject to conformity in this connection with the flood control agreement between the United States, the State of Florida, and the Central and Southern Florida Flood Control District, hereinabove mentioned. The primary use of funds appropriated by the Florida Legislature for flood control purposes should be in accordance with the above-mentioned flood control agreement, except to such an extent as the Florida Legislature has provided otherwise in its legislation.

Question 2 relates to state and district funds appropriated or made available by the Florida Legislature, including items 323 and 324, §1, Ch. 65-135, Laws of Florida, for land acquisition and construction matching and bridge construction and the use of such appropriated funds, especially as to the moneys deposited in court for payment for lands taken under eminent domain proceedings. Section 282.081, F. S., should be conformed to because it is applicable to the above-mentioned appropriations. Moneys paid into court from funds appropriated by items 323 and 324, §1, Ch. 65-135, Laws of Florida, would be subject to the requirements of said §282.081, F. S. If the appropriation has expired when the unused funds are released by the court, they would have to be conformed to said §282.081, F. S.

Unused district tax funds resulting from the release of tax funds by the court, deposited for eminent domain proceedings, would appear to have the status of unused funds and should be treated as such in the preparation of the next ensuing operating budget, or maybe by an amended budget if permitted, by §378.28, F. S. I am not advised what the district practice in this connection has been.

However, any such funds allocated for land acquisition and deposited in the registry of the court awaiting a condemnation award and which may be returned by the court as excess may, by compliance with §282.081, F. S., by means of an appropriate resolution describing or identifying the project within which there is still land to be acquired and for which the excess to be received from the court will be used, be reserved as obligated for that purpose, and carried forward by the agency.

067-11—March 2, 1967

CONSERVATION—WATER RESOURCES

CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL
DISTRICT—1965 CONTRIBUTION TO WATER RESOURCES
AND DEVELOPMENT PROJECT

To: *G. E. Dail, Jr., Executive Director, Central and Southern Florida
Flood Control District, West Palm Beach*

QUESTIONS:

1. Does the wording of the 1965 appropriations act of the Legislature of Florida, with reference to the moneys appropriated for Central and Southern Florida Flood Control District out of the water resources account prevent the use of a portion of said funds for acquisition of water flowage or storage easements on lands in the St. Johns River Basin?

2. May funds from the "Contribution to Water Resources Development Projects" account be used to mitigate damages which would result from impoundment and storage of water, in instances where mitigation of damage would be cheaper than purchases of land rights in the St. Johns Reservoir?

The Florida Legislature, at its 1965 regular session, by Ch. 65-135, Laws of Florida, made certain appropriations from the general revenue fund of the state, to the State Board of Conservation for use of the Division of Water Resources and Conservation, for water resources and development in the Southwest Florida Water Management District and the Central and Southern Florida Flood Control District, consisting of appropriations for land acquisition, construction matching and bridge construction, the same being items 321 and 322, as to the Southwest Florida Water Management District, and items 323 and 324, as to the Central and Southern Florida Flood Control District, in the amounts mentioned in the said items.

An examination of Ch. 378, F. S., relating to flood control districts generally, and Chs. 25214 and 25270, Laws of Florida, 1949 (duplicates), creating and establishing the Central and Southern Florida Flood Control District, and Chs. 61-691 and 63-659, Laws of Florida, creating and establishing the Southwest Florida Water Management District, reveals that these projects are cooperative projects carried on jointly by the State of Florida and the United States government. (See AGO 052-198, of June 25, 1952.) The appropriations in items 321, 322, 323 and 324 of §1, Ch. 65-135, Laws of Florida, must be construed in the light of the said cooperative venture between the State of Florida and the United States.

The works of the flood control districts would seem to consist of drainage and control canals, catch basins, water storage areas, control equipment and machinery necessary to maintain flood control and drainage requirements. Much of its equipment, machinery, canal locks and equipment, storage basins, and other property, will be of permanent status and location, for which fee title should be acquired, although not absolutely necessary. Much of the works necessary for flood control require only surface rights, but may be maintained without subsurface rights in real property. Oil, gas, mineral and other subsurface rights are not required for the operation of flood control facilities and works. There seems little, if any, reason why even storage areas might not be maintained on surface rights to realty, and why overflow areas, as well as drainage ditches and facilities may not be maintained on surface rights,

when acquired by and through proper contracts and conveyances of or concerning land.

The word "land" is employed in various senses in particular phrases (73 C.J.S. 165, §7). Ordinarily the word "land" is deemed to be synonymous with "real estate," "real property" and includes lands, tenements and hereditaments (73 C.J.S. 162, §7). The words "land acquisition" as used in items 321 and 323, §1, Ch. 65-135, Laws of Florida, in connection with references to the Southwest Florida Water Management District, and the Central and Southern Florida Flood Control District, refers to such interests in lands as may be necessary for the operation and maintenance of the said districts, as contemplated by the federal and state laws applicable thereto. Unless there be some reason or reasons why surface rights in land and lands, such as underground drains, etc., necessitate subsurface works, I see no reason why surface rights would not suffice for water storage areas, overflow areas, etc., in connection with flood and water control districts. Whether or not surface rights in lands will be sufficient would seem to be largely a question for the army engineers, and the engineers of the flood control districts, whose determination would appear to be sufficient.

Question 1 is answered in the negative.

The right to acquire property by condemnation carries with it the constitutional duty to pay "just compensation" or "full compensation," as the case may be. The damages referred to in question 2 involve such things as raising the level of a road, or in the alternative, to buy the road and the property to which the road leads. It would also involve costs of providing access to property or payment of severance damages (*Fleming v. State Road Department*, 25 So.2d 373). Failure to make such payment gives full right and authority to the landowner to sue in equity or at law for collection of his damages, regardless of the sovereign's immunity (*White v. Pinellas Co.*, 174 So.2d 88).

Any mitigation of damages necessary either by virtue of a contractual relationship between the parties involved or as a result of additional damages flowing from the acquisition of property by purchase or condemnation is within the contemplation of the law and is a justified expenditure.

Question 2 seems to involve mitigation by contract which is in accordance with my answer to question 1 permitting purchase of less than the fee title. This, of course, is permissible, but should only be accomplished by those legal means that would prevent the possibility of a payment for any such damages in future years; for example, by means of a stipulation in court confirmed by final decree, by an easement duly recorded, or by some document or conveyance involving the parties containing a covenant running with the land.

On the other hand, the question as presented could very well be interpreted to mean that damages were knowingly or perhaps even willfully incurred with the idea of hopefully forcing an agreement between the parties for mitigation, as where flooding had occurred or was threatened without condemnation. This is not contemplated by the law and should not be condoned. Any semblance of possible fault or bad faith must at all costs be avoided.

Question 2, as worded, is therefore answered in the negative, with the exception that under proper circumstances of contract, easement or covenant running with the land the "cost to cure" would be considered proper.

067-12—March 6, 1967

CRIMINAL LAW—IMMUNITY

LOSS OF EMPLOYMENT AS CONSTITUTING "PENALTY OR FORFEITURE" AS SET FORTH IN §932.29, F. S.

To: *Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee*

QUESTION:

Is loss of employment with a county board of public instruction included within the meaning of the terms "penalty or forfeiture" as set forth in §932.29, F. S., wherein it states, in part: ". . . but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding."?

In the explanatory letter which accompanied your request I find that a truck driver employed by a county school system had been subpoenaed by the state attorney to testify, gave testimony on behalf of the State of Florida, and, during cross-examination, testified that several years ago he had taken home with him some gasoline belonging to the board of public instruction by whom he was employed. The witness had been given immunity by the state attorney and the question now arises as to whether the driver can be discharged from his employment by the school board, such discharge being based solely upon his testimony that he had taken property belonging to the school board.

Section 932.29, F. S., provides as follows:

No person shall be excused from attending and testifying, . . . before any court upon any investigation, proceeding or trial, . . . upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, (Emphasis supplied.)

In the case of *Hotel and Restaurant Commission of the State of Florida, et al. v. Joseph A. Zucker, et al.*, 116 So.2d 642, the Third District Court of Appeal of Florida, in determining whether the Hotel and Restaurant Commission could properly revoke the motel license of a person based upon incriminating testimony of the licensee given before an assistant state attorney, was faced with a similar question.

In holding that the revocation of such license would be a "penalty or forfeiture" as contemplated by §932.29, F. S., the district court, in affirming the lower court, said:

The chancellor acted on the authority of the case of *Florida State Board of Architecture v. Seymour*, Fla. 1952, 62 So.2d 1, where the Supreme Court affirmed a decree which enjoined a proceeding for the revocation of a certificate of an architect. The ground for the injunction there was the same as that which was relied on here, that is, immunity was claimed under §932.29, Fla. Stat., F.S.A., because the party involved had previously testified before the state attorney (and in that case also before the grand jury) as to acts constituting an offense named in the

statute, and which acts were the basis of the board's proceeding against him. That case and the case of *State Beverage Department of Florida v. State ex rel. Zucker*, supra, [116 So.2d 640], support the chancellor's holding here that the immunity gained under §932.29, Fla. Stat., F.S.A., will exempt the person not only from criminal prosecution for the transaction or matter concerning which he may have so testified or produced evidence, but will give him immunity from being "subjected to any penalty or forfeiture" therefor, and that revocation or suspension of a license such as that involved here amounts to imposition of a penalty within the meaning of the statute.

Based upon the rationale of that case, the loss of employment by a governmental employee pursuant to his testimony would be no less of a "penalty or forfeiture" than would be the loss of a license to pursue a trade or profession and therefore, the testimony given by the employee under the circumstances could not be used as a basis for his discharge from employment.

067-13—March 7, 1967

REAL PROPERTY

ESTATE BY THE ENTIRETIES—HUSBAND AND WIFE EACH CONSTITUTE ONE LANDOWNER

To: *Mary Earle Walker, Tax Assessor, Seminole County, Sanford*
QUESTION:

Chapter 57-1815, Laws of Florida, provides that contiguous territory may be annexed to the city of Sanford upon petition signed by a majority of the landowners of the area sought to be annexed. Are a husband and wife owning property as an estate by the entireties within the area sought to be annexed considered one or two landowners?

It is my opinion that Willard and Ola Harrison should be considered as *two* landowners within the purview of Ch. 57-1815. This chapter deals with the annexation of contiguous territory by the City of Sanford. It provides that annexation must be by one of two methods:

Method one is "By a referendum election in which a majority of those voting on the question of annexation approve the annexation; those voting must be the *registered freeholders* of the area sought to be annexed. . . ." (Emphasis supplied.)

Method two is "Upon petition of not less than a *majority* of the *landowners* of the area sought to be annexed." (Emphasis supplied.)

In your situation you indicate that a petition has been circulated and presented and that both the husband and wife have signed said petition. This gives rise to the controversy. If we consider the husband and wife as two landowners this will mean that a majority of the landowners have signed.

An examination of the previously cited chapter reveals that the legislature has clearly spelled out how annexation may be accomplished. The legislature uses the word "landowners." The legislature has not used the word "parcel" or in any way indicated that the annexation is to be determined on the basis of the number of parcels of land involved. Had the legislature so desired it could easily have done so. Since it has remained silent I must conclude that the legislature intended to remain silent. The expression of one thing amounts to an exclusion of others.

However, this does not completely answer your question since under some early legal theories a man and his wife were considered as one. I

recognize that most, if not all, of the early common law disabilities of a woman after marriage no longer exist. A married woman may now be a free agent. She may now retain separate property which is owned separately by her and is considered as distinct from that which is owned by her husband or that which is owned jointly with her husband. The wife now carries a separate vote. Both the husband and wife are considered as voters insofar as the holding of elections.

In this connection let us remember the other method by which a city may annex contiguous territory. Annexation may be accomplished by referendum election approved by a majority of registered freeholders. Certainly both the wife and the husband would be considered to be registered freeholders. Then why shouldn't both the wife and the husband be considered landowners?

I have examined certain cited authorities from other jurisdictions which have dealt with similar situations. The case of *Rhodes v. Koch*, a 1916 Missouri case found in 189 S.W., p. 641, dealt with a situation under a statute allowing for street improvements by a city unless a majority of the landowners filed a protest against such an improvement. This case held that under such provision a husband and wife owning an estate by the entirety are not one owner, but two owners. In this case the court stated:

Appellants contend that as to these respective lots there could be counted but one owner; that is, that the husband could not be counted as an owner and the wife as an owner so as to make two owners of the same piece of property; in other words, that in counting the owners of land under the statute above referred to the husband and wife are to be counted as but one owner, and not as two owners. We disagree with appellants on this point, holding that a husband and wife owning an estate by the entirety are each owners within the contemplation of the statute under which this proceeding was brought and by which the remonstrance must be measured.

The court further pointed out: "The statute requires a majority of the resident owners of lands; it does not require a majority of the estates abutting the street."

In the case of *Findley-Kehl Investment Co. v. O'Connor*, 256 S.W. 798, a similar question arose. In this case the question was how much of the front footage should be counted where only the husband signed the remonstrance or protest. Therein the court stated:

This peculiar estate raises the question as to how much of this frontage should be counted. Appellants concede a count of one-half, and respondents insist upon all. The ownership of Sills, who signed, pertained and attached to the whole frontage or estate and not to a part. This is true although the wife was living. She likewise was an owner of the whole. We think this whole frontage should have been counted.

The case of *Kitchen v. City of Clinton*, 8 S.W.2d 602, dealt with a situation where improvements could be commenced by a city unless: "... [A] majority of the resident owners of the lands that would be liable for the cost of the improvement ... shall not within ten days ... file ... their protest against such improvement."

The court stated:

We disagree with appellants on this point, holding that a husband and wife owning an estate by the entirety are each owners within the contemplation of the statute under which this pro-

ceeding was brought and by which the remonstrance must be measured. The statute requires a majority of the resident owners of lands; it does not require a majority of the estates abutting the street. (Emphasis supplied.)

I am not unaware of the case of *Marks v. Bettendorf's, Inc.*, 337 S.W.2d 585. This case dealt with the situation where certain protest petitions to zoning changes were signed for by one owner of a tenancy by the entirety. In this case the court refused to consider those areas where only one owner had signed and contended that since these areas had not been signed for by both owners, the required areas were not signed for.

This case distinguished the *Rhodes* case and the *Kitchen* case by stating that these cases dealt with different statutes "wherein the sufficiency of the protest is not measured by the area represented but by the number of the owners that sign."

Further therein the court stated: "... the *Kitchen* case was not decided upon the point before us, but was on a per capita account of the owners."

Consequently, this case does not expressly repudiate the doctrines previously set forth. Further, the situation presently at hand involves a Florida law which seems to clearly connote the signing of a petition on a per capita basis.

Therefore, the husband and wife should be considered as two land-owners within the purview of Ch. 57-1815.

For cases dealing with related subjects see *City of Fort Lauderdale v. DesCamps*, Fla., 111 So.2d 693 and the Circuit Court case in Volusia County, Chancery No. 39,274, of *Polak v. City of Daytona Beach*.

067-14—March 13, 1967

PUBLIC MONEY

COUNTY DEPOSITORIES, QUALIFICATION; DEPOSIT OF COUNTY FUNDS IN BANKS OUTSIDE THE COUNTY

To: *Fred O. Dickinson, Jr., State Comptroller, Tallahassee*

QUESTIONS:

1. When a bank is to serve as a depository, is it necessary for the bank, the comptroller, and the respective board to enter into a designation and agreement?

2. If the bank is to serve only as a depository for the board of public instruction, is it necessary for the bank, the comptroller, and the board of county commissioners to enter into a designation and agreement?

3. When a bank or banks are qualified as depositories in a county, may the board of county commissioners or the board of public instruction deposit funds in a bank outside the county that pledges securities to cover the deposits?

4. If the board of county commissioners or the board of public instruction deposits funds in a bank outside the county when there are qualified depositories within the county, is this action the sole responsibility of the board? What is the comptroller's responsibility if any?

County depositories in Florida are provided for and regulated by Ch. 136, F. S. Under §136.01, F. S., "Any bank, national or state, authorized to do business in this state . . ." which complies with the requirements of §136.02, F. S., may become a county depository for

county funds, which include "county funds, funds of county officers and funds of the county board of public instruction."

Upon a bank complying with the requirements of §136.02, F. S., to the satisfaction of the State Comptroller, said section states in part:

... the comptroller of the state shall issue his certificate showing that said bank has qualified as a county depository, and the securities deposited by such bank . . . [as provided in said §136.02, F. S.] shall secure all funds, jointly and severally, that shall be deposited in such banks by any and all officials of the several counties, by the several boards of county commissioners and the boards of public instruction of the several counties. When a bank or banks in the county qualify as a county depository as herein provided, such bank or banks shall be eligible to receive deposits of the funds of the officers and boards herein mentioned, and shall be entitled to its or their pro rata share of the deposits of the board of county commissioners and board of public instruction of such county; but in case no bank within the county should qualify, then the said board of county commissioners and board of public instruction shall divide such deposits among the banks in some other county or counties which have qualified as county depositories . . . provided, however, that nothing herein contained shall prohibit county officials, boards of county commissioners or boards of public instruction from recognizing and accepting the insurance coverage afforded by the federal deposit insurance corporation, which is now recognized by §659.24(2), nor the payment of interest on any funds under the terms of such agreement as may be entered into between the proper depositing officials or boards and the banks, provided the payment of such interest is permitted by state or federal law . . . (Parenthetical matter added; emphasis supplied.)

The proviso contained in the above-quoted portion of §136.02, F. S., to the effect that the county officials are not prohibited from recognizing and accepting the payment of interest on any funds under such agreement as they may reach with banks, seems to qualify the entire section. This proviso appears to bestow upon the board of county commissioners and the board of public instruction a discretionary power to negotiate an agreement for the payment of interest under contractual terms more advantageous to the public interest, and to such boards, with a qualified bank in other counties. It further appears to vest a discretion in such boards to deposit county funds in interest-bearing accounts in any qualified depository wherever located, when in their judgment the county or the school board may obtain a better interest rate, or better withdrawal privileges without loss of interest or penalty, or better investment service, or whenever any reasonable benefit or advantage to the public will be derived therefrom, over and above that which may be obtained locally or from banks within the county.

The basic intention of §136.02, F. S., seems to be that public moneys on deposit in a bank be adequately secured while so deposited, and that the county officials show no favoritism in making deposits of county funds to a particular bank over other banks where several in the county have qualified as depositories. This section should not be so stringently construed as to result in harm to or adverse effect upon the public interest in its operation, or to deny to public bodies in their financial transactions the advantages and freedom of transaction accorded to private, financial and commercial enterprises. Otherwise, in those counties having only one qualified depository, or only a few qualified depositories, such

depository or depositories could so act as to deny to the public the payment of reasonable rentals on deposits of public moneys, or indeed fail to pay any interest at all on such deposits.

The statute does not direct or require the banks to agree to pay interest on public deposits, or any particular rate of interest, in order to qualify as a county depository, or as a prerequisite to their eligibility to receive deposits of county funds or to their entitlement to their pro rata share of the deposits of the county and school officials. If this statute be so rigidly construed as to grant to qualified depositories an absolute right to receive all or a pro rata share of all county funds available for deposit or investment, whether short or long term or on an interim basis, then one or more banks in the county could refuse to pay or refuse to agree to pay interest on demand deposits or on interim time deposits where all or part of such demand or time deposits are withdrawn or transferred during or prior to the expiration of fixed interest periods or payment dates. They could refuse to pay or refuse to agree to pay interest on public deposits at the rates prevailing in other counties on private and commercial deposits of a similar nature, or agree only to a lower rate. Yet, under any such rigid construction, any such bank or banks so acting would still have an absolute right to receive their full pro rata share of the county deposits, without the payment of a fair rental for the use of such public funds, all to the detriment and harm of the citizens and taxpayers of the county. The smaller bank conceivably would not be equipped or qualified by law to adequately service county accounts or interim investments or to efficiently render investment or trust services needed or required by the county or the school board. Banks with smaller capitalization and reserves and surpluses may be unable to secure multimillion dollar deposits of construction moneys or the proceeds of the sale of revenue certificates and bonds or of cooperative federal grants to the extent and in the manner required by law for the security of such county and public funds.

In the above circumstances, I am therefore constrained to conclude that the proviso of §136.02, F. S., qualifies the entire section of the statute and vests in the board of county commissioners and the board of public instruction a discretion to negotiate for the payment of interest with, and to deposit county funds in, qualified depositories located in other counties whenever in their judgment the overriding public interest so requires or it is to the benefit and advantage of the public that they so do, whenever they are unable to obtain as advantageous rate of interest or withdrawal privileges or investment and management services as they could secure outside the county.

With respect to the accounts, funds and deposits reflected in your file and memorandum submitted with your request for this opinion, I am of the opinion that these moneys and trust funds or trust moneys are not county funds within the purview of Ch. 136, F. S. These special tax moneys collected for a special purpose and encumbered and pledged to secure certificates or bonds, though public moneys when collected, are charged and encumbered with a trust for special purposes, and the lien or pledge attaches thereto upon collection. In effect these are moneys of the bondholders deposited irrevocably in trust for dedicated purposes, upon which trust fund the certificate holders have a charge or lien.

The taxing authority covenants in the bonding contracts to levy and collect the special taxes and as collected to pay them into, or deposit them to the credit of, the sinking fund and the reserve accounts within the sinking fund. The bondholders look both to the pledge of the taxing power and to the sinking fund and the reserve funds therein for both their security and payment, as well as to the paying agent bank for the management and disbursements, as well as the investment and reinvest-

ment, of the moneys to which they are entitled under the bonds and bonding contracts. In all events, these special tax moneys are for the use and benefit and the security of the holders of the certificates or bonds.

The investment or reinvestment of the funds in the sinking fund and its reserve accounts customarily is made a function of the paying agent bank authorized and required by the bonding contracts and resolutions, and all of its actions, liability and responsibility are controlled and governed by such contracts to which it has become a party by accepting the trust and the duties and obligations imposed upon it by such trust and contract. In effect, the paying agent bank becomes an agent of and trustee for the contracting parties, and receives and holds these trust moneys, investing and reinvesting the same, and manages and disburses and accounts for the funds and its actions as provided for in the bonding contracts, which may be likened to and in effect are, at least in part, a trust indenture, all of this as a part of the whole transaction bargained for and agreed upon as between the county or the school board and their fiscal agents and the underwriters, the paying agent banks, and the ultimate holders of the certificates or bonds. The paying agent bank merely executes the bond agreements, manages and secures the investment and reinvestment of the sinking and reserve accounts, and makes the disbursements under the authority and in accordance with the terms of the several instruments that make up the bond contract.

In view of the foregoing, it appears to me that the deposit and investment of such trust funds are governed by the conditions of the bond resolutions and contracts, and not by the provisions of Ch. 136, F. S.

In light of the foregoing, your specific questions are answered as follows:

1. When a bank is to serve as a depository of county funds, it is not necessary for the bank, the comptroller and the respective board to enter into a designation and agreement.

2. If the bank is to serve only as a depository of school funds for the board of public instruction, it is not necessary for the bank, the comptroller and the board of county commissioners to enter into a designation and agreement.

3. When a bank or banks are qualified as depositories in a county, funds of the board of county commissioners or the board of public instruction ordinarily should be deposited in such bank in the county as contemplated by §136.02(1), F. S. However, these boards are vested with and have the discretion to negotiate for the payment of interest with, and to deposit county or school funds in, qualified depositories in other counties of the state whenever it is to the public benefit or advantage that they do so or whenever the public interest requires it be done in their judgment; and further provided, that trust moneys or special tax moneys collected for and pledged to the payment of bonded indebtedness are not to be deemed county or school funds within the purview of Ch. 136, F. S., and the deposit and investment of such trust funds shall be in accordance with and governed by the resolutions, the validating decree of the court, and other documents and instruments making up and constituting the bond contract with the bondholders.

4. The sole responsibility for depositing county or school funds in a bank outside the county when there are qualified depositories in the county rests with the particular county or school board involved. There is no specific statutory responsibility on the part of the comptroller to require that funds be placed in county depositories.

This opinion prevails over and supersedes any conflicting statements or conclusions in AGO's 063-84 and 064-25 to the extent of any such conflict.

067-16—March 31, 1967

OCCUPATIONAL LICENSES

PROFESSIONAL ENGINEER—CIRCUMSTANCES REQUIRING
LICENSE WHEN PRACTICING PROFESSION IN
FLORIDA—§205.52, F. S.*To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee*

QUESTIONS:

1. Is a professional engineer working full time for a firm or corporation in Florida required to obtain an occupational license under §205.52, F. S., where such work includes professional engineering duties?

2. Is an occupational license under §205.52, F. S., required of a professional engineer practicing his profession for a firm or corporation doing business exclusively under a contract with the United States government and such professional engineer's services are performed exclusively on property owned by the United States government?

Question 1 is answered in the affirmative. The question and answer are directed to the example given by the Deputy Tax Collector of Brevard County in his letter to you, of an engineer working for the Florida Power & Light Company and there being no question of the work being performed exclusively in a federal area. The occupational license is not required merely because the engineer has been registered under Ch. 471, F. S., as a professional engineer. The occupational license is required when he practices his profession. Your attention is directed to §471.02(6), F. S., which makes a person performing certain services not a professional engineer, and a person performing only those services enumerated under said subsection (6) would not be required to obtain an occupational license under §205.52, F. S. Persons expressly exempted under §471.05, F. S., would not be required to obtain such an occupational license. Section 471.05(5), F. S., exempts certain regular full-time employees of a corporation not engaged in the practice of professional engineering under the circumstances described therein.

AS TO QUESTION 2:

The fact that a firm or corporation is doing business in Florida under a federal contract does not relieve the professional engineer working for such firm or corporation from the license requirement of §205.52, F. S. Where, however, in a federally-owned area the United States has acquired exclusive jurisdiction over such area within the boundaries of the state, the state is without authority to impose an occupational tax for the privilege of conducting a business or profession exclusively within that federal area. *James v. Dravo Construction Co.*, 58 Sup. Ct. 208, 82 L. Ed. 155; 33 C.J.S., Licenses, §6b. The jurisdiction over land within the boundaries of a state acquired by the United States by the exercise of its power of eminent domain is dependent upon the cession by the state, and the state may qualify the cession of jurisdiction by reservations not inconsistent with governmental uses. Under §6.04, F. S., the legislature has given the Governor of the State the authority to cede to the United States exclusive jurisdiction over land acquired by it within the state, except the state reserves concurrent jurisdiction only as to the execution of civil and criminal process. Therefore, upon the execution by the Governor of Florida of a document ceding exclusive jurisdiction to the United States of lands owned by the federal government in Florida, then Florida no longer has jurisdiction to impose license taxes

upon businesses or professions conducted in the federal area to which such exclusive jurisdiction has been ceded under such statute. *International Business Machines Corporation v. Vaughn*, 98 So.2d 747.

On January 25, 1955, the Governor of Florida ceded jurisdiction to the Air Force Missile Test Center at Cape Canaveral, in the terms authorized in §6.04, F. S., by document recorded in Book B, pp. 249-251, Office of the Secretary of State. Therefore, the answer to question 2 is that a professional engineer practicing his profession exclusively within the territory of the Air Force Missile Test Center as described in the document of cession aforesaid cannot be required to obtain an occupational license under §205.52, F. S.

067-17—April 6, 1967

PURCHASING COMMISSION

AUTHORITY OF EXECUTIVE DIRECTOR TO EXECUTE CONTRACTS—APPROVE EMERGENCY PURCHASES

To: *Al J. Day, Executive Director, Purchasing Commission, Tallahassee*

QUESTIONS:

1. The executive director submits all price agreements and contracts to the Cabinet Purchasing Commission requesting approval and authorization to execute the same. The action taken by the Purchasing Commission is recorded in the official minutes of the commission and, thereafter, based on this authority, the executive director executes the contracts by his signature. The auditor questions the authority of the director to execute these contracts. Please advise.

2. Section 287.081(1) and (2), F. S., requires approval of the commission on all emergency purchases and to transactions listed in subsection (2). Customarily, upon the agency head's compliance with the provisions of this section of the statutes, the executive director approves such purchases without Purchasing Commission authorization. The auditor questions the executive director's authority. Please advise.

AS TO QUESTION 1:

Chapter 287, F. S., authorizes and directs the Purchasing Commission to perform certain duties and have certain powers, one of which is the negotiation and execution of contracts or agreements for the purchase of certain items, specifying prices of items which agencies of the state may purchase. Customarily, these are referred to as purchasing agreements and contracts. No actual purchase of goods or merchandise is made by the Purchasing Commission under these purchasing agreements and contracts.

Chapter 287 additionally authorizes the Purchasing Commission to employ a director and others, and it is through the director and others that the details necessary to arrive at the prices, competitively, are arranged and handled, including the determination of the specifications of the materials to be furnished. When all such details are handled, including a tabulation of all bids received, a report of this fact is made by the director to the Purchasing Commission, and if the purchasing agreement or contract is approved by the Purchasing Commission this fact is made a matter of record in the minutes of the Purchasing Commission, and by such minutes the commission authorizes the director, for and on behalf of the commission, to execute the contract.

Under these facts, it is my opinion that the director, at the direc-

tion of the Purchasing Commission, has authority, for and on behalf of the commission, to execute a contract and agreement.
AS TO QUESTION 2:

Chapter 287, F. S., originated in Ch. 57-171, Laws of Florida. At that time, provision was made by §287.081, F. S., for certain emergency purchases [subsection (1)] and for an exemption from bidding requirements [subsection (2)] where items were available from one source only. The proviso attached to these two exceptions permitted the agency head to make the purchase, and within ten days thereafter make the certification of the facts under which the purchase was made to the Purchasing Commission. However, in 1961, by Ch. 61-293, Laws of Florida, the legislature made a change in this law to the effect that prior to the purchase under either subsection (1) or (2) of §287.081, F. S., the agency head should file a statement under oath of the facts and circumstances constituting the emergency [subsection (1)], and the provision thereafter is that "Upon receipt of such statement the purchasing commission may, in writing, authorize the purchase."

A similar provision exists as to the single source items provided by §287.081(2), F. S., but without the necessity of the statement by the agency head being under oath.

It is clearly apparent then that the legislature, having observed the operation of the Purchasing Commission between the years 1957 and 1961, determined that the Purchasing Commission would make the ultimate judgment decision as to the existence of the emergency or the fact that the item sought is a "single source" item and therefore not competitive.

In view of this positive legislative intent, it is my opinion that the purchasing director is without authority to approve any purchase under §287.081(1) and (2), F. S.

067-18—April 7, 1967

ALCOHOLIC BEVERAGES

TAX VALUATION OF ALCOHOLIC BEVERAGES AS STOCK-IN-TRADE—MEASURE, ETC.

To: *Fred O. Dickinson, Jr., State Comptroller, Tallahassee*

QUESTION:

When assessing alcoholic beverages of a wholesale distributor as stock-in-trade, under §192.05, F. S., upon which state and federal excise tax stamps have been placed, should the face value of such stamps be taken into consideration when fixing the taxable value of such alcoholic beverages?

Generally, federal excise taxes on alcoholic beverages are due and payable when withdrawn from a federal bonded warehouse, or at the end of 8 years, whichever is the earlier. (§§5001, 5006, 5012, etc., Title 26, U.S.C.) As to alcoholic beverages sold in Florida, it is provided that each purchaser of beverage stamps:

... shall by such purchase become obligated and required to affix such stamps to the bottles or immediate containers in which beverages requiring stamps are sold, and stamps of the required amount shall be affixed thereto before such beverages are sold by any distributor. (§561.47, F. S.)

An examination of other sections of the Florida beverage laws (Ch. 561, F. S.) leads to the conclusion that Florida beverage taxes accrue and are payable when such beverages are sold by a beverage distributor.

See also §§561.47, 561.48 and 561.49, F. S. Both the federal and the state statutes make provision for the sale and distribution of alcoholic beverage stamps to be used to evidence the payment of alcoholic beverage excise taxes, by affixing such stamps to the container in which such beverages are stored, unless stored in a federal bonded warehouse. The federal taxes are due and payable as soon as the alcoholic beverages come into existence, unless placed in a bonded warehouse, and, if placed in such a warehouse, when taken from such warehouse, or at the end of 8 years, if kept therein for such period of time. This being true, often such beverages remain in such bonded warehouses for periods of time up to 8 years without the said taxes being due or payable thereon.

Arrangements have been provided by statute or by rule and/or regulation, under which manufacturers and importers, or distributors, may purchase and attach required beverage stamps to their alcoholic beverages which they plan to sell or which may be sold to dealers in a particular state or states, subject however, to the possibility of such beverages being sold to persons in another state or country, in which case the federal government or the state will, upon their compliance with certain requirements, have such taxes refunded to them. These things point up the fact that the presence of federal or state revenue stamps on such beverages is not conclusive evidence that the taxes on such beverages have been paid. The fact of tax payment does not seem to become final and conclusive in this state until after such beverages have been sold and title passed from the distributor to another person, firm or corporation in this state.

From these observations and statutory provisions, alcoholic beverage taxes do not appear to become a part of the taxable value of alcoholic beverages in internal revenue warehouses or until the expiration of 8 years from the time placed in the warehouse, as to federal taxes, and not until sold by the distributor as to state taxes. Although state and federal alcoholic beverage stamps may have been attached to sealed alcoholic beverage containers, it does not follow as a matter of fact that such taxes have in law been paid. The primary purpose of the federal statutes, as well as the state statutes, is to require the stamping of alcoholic beverages destined for sale in this state prior to or at the time they are sold by a beverage distributor. Until so sold there remains the possibility of such beverages being transferred for sale in another state or country. Doubtless the placing of stamps on beverage bottles and containers is more of a convenience than a payment of a tax. Had the beverages in question been in an internal revenue bonded warehouse, I would not be inclined to classify the placing of stamps on such beverages as a payment of the tax but as a convenience, permitting stamping ahead of time, subject to a refund of the amount of such stamps if shipped to another state or country. Although the stamps were placed on said beverages, had they been shipped to another state to a purchaser residing therein so that the sale occurred in such other state, there being no sale in this state, such taxes would accrue to the state to where shipped instead of in this state. Section 562.15, F. S., indicates that Florida beverage taxes do not apply to manufacturers or distributors licensed under Florida beverage statutes, to bonded warehouses or to common carriers. I am inclined to the view that when an alcoholic beverage distributor, duly licensed, obtains a shipment of alcoholic beverages that the Florida tax is not due and payable until such beverages are sold by him. The placing of beverage stamps thereon should not be deemed the payment of the tax unless and until sold by the distributor, which event should be deemed the incident as the date of tax payment for purposes of this opinion.

A question of equal protection of the laws, like and similar to that

involved in AGO 065-98, of Aug. 31, 1965, appears to be involved here, at least as to the federal tax, when we come to the question of taxation of alcoholic beverages as stock-in-trade. Manufacturers and distributors of alcoholic beverages who maintain their stocks of alcoholic beverages in internal revenue bonded warehouses are not required to pay the tax thereon unless and until such beverages are removed from such, or a period of 8 years has expired. Under §5001, Title 26, of the U.S.C., there is imposed an excise tax of \$10.50 per gallon upon alcoholic beverages produced within the United States, which tax is payable upon manufacture unless placed in an internal revenue bonded warehouse, in which case it is payable when taken from the said warehouse, or upon the expiration of 8 years if it remains in the warehouse.

Should there be two distributors, one storing his alcoholic beverages in an internal revenue bonded warehouse and the other in his privately-owned warehouse, the first would not be required to pay the taxes on his beverages until removed from the warehouse while the other would be required to pay a tax of about \$10.50 per gallon. It is usually estimated that such alcoholic beverages, prior to taxation, have a value of not exceeding \$2.50 or \$3 per gallon. There is authority for the proposition that state excise taxes on alcoholic beverages should be included in valuing such beverages for tax purposes, including such beverages as stock-in-trade. (*Cass v. Colorado Beverage Co.*, 122 Cal. 101, 220 P.2d 867, and *Consolidated Distributors, Inc., v. Atlanta*, 193 Ga. 853, 20 S.E.2d 421). However, such beverage taxes not being due and payable to the United States until removed from internal revenue bonded warehouses, or at the end of 8 years, and state beverage taxes not being due and payable until sold within the State of Florida, a material difference arises between the valuation of alcoholic beverages held by distributors in internal revenue bonded warehouses and those held by distributors in their own warehouses not constituting internal revenue bonded warehouses. Such differences in valuations might easily vary as much, or maybe more, than the \$10.50 federal excise tax on such beverages.

It is generally understood that the wholesale value of alcoholic beverages, less the state and federal excise taxes imposed thereon, would probably be between \$2.50 and \$3 per gallon; however, when federal taxes of around \$10.50 (§5001, Title 26, U.S.C.) and state taxes of around \$2.97 (§§561.46 and 561.64, F. S.) making a total tax of around \$13.47 per gallon, are taken into consideration, the said taxes become a material factor when considering taxation. Without such taxes the value of such beverages would be between \$2.50 and \$3 (these figures are approximations), but if such taxes are included these figures become between \$15.97 and \$16.47 per gallon, instead of the \$2.50 to \$3 per gallon without taxes. This increased figure becomes material when we compare the distributor who maintains his stock-in-trade in an internal revenue warehouse to a distributor who maintains his stock-in-trade in other than an internal revenue warehouse. In the first instance, if the taxes paid are included, the valuations would run between \$15.97 and \$16.47 per gallon, but in the latter case only \$2.50 to \$3 per gallon. The tax on the distributor maintaining his own warehouse would be about 6.388 times the tax paid by the distributor who maintains his stock-in-trade in an internal revenue warehouse. This brings this case within the purview of AGO 065-98, of Aug. 31, 1965, which related to a similar problem concerning gasoline as stock-in-trade, and which opinion I deem applicable here. See also *F. Strauss and Son, Inc., v. Coverdale*, 205 La. 903, 18 So.2d 496, text 498 and 499.

The above-stated question is answered in the negative.

067-19—April 13, 1967

PUBLIC OFFICERS AND EMPLOYEES

REIMBURSEMENT FOR TRAVEL EXPENSES BY A SECRETARY OF A GRAND JURY

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

If the secretary of a grand jury is directed by the said grand jury, acting through its foreman, as well as requested by the state attorney, to travel from the courthouse in one county to the office of the state attorney in another county, in connection with a matter pending before that grand jury, may such traveler be compensated under §112.061, F. S.?

Our primary concern here is the construction and application of §40.24, F. S., relating to the compensation of grand and petit jurors, which section is as follows:

Grand and petit jurors of the regular panel and jurors summoned to complete a jury after the regular panel is exhausted in all the courts of the state as well as jurors summoned upon inquest of the dead, shall receive for each day of active attendance upon the court or inquest, five dollars. Jurors summoned to complete a panel after the regular panel is exhausted, and who are not accepted and not required to serve on the jury, shall receive compensation of five dollars per day, and all fractional parts of a day shall be counted as a day. In addition to the compensation above provided, all jurors shall receive five cents per mile for every mile necessarily traveled in going to and returning from court by the nearest practicable route. Jurors who attend on any of the days of the term when the presiding judge is absent, or being present, does not hold the session of the court, shall be entitled to receive the same compensation as if the court was in session.

It is the grand jury as a body, and not its individual members acting on their own volition outside of a grand jury room, which constitutes the agency of the state known as a grand jury (*Skipper v. Schumacher*, 124 Fla. 384, 169 So. 58, text 64). It is an inquisitorial and accusatorial body (*Lake v. State*, 100 Fla. 373, 129 So. 827, text 830). The grand jury is of ancient origin in the history of England, going back many centuries (24 Am. Jur. 833, §3). It has generally been regarded as a part of the court to which attached and as being, to some extent, under the control and supervision of the court; however, the courts are not generally in agreement as to the extent of its independence of the court (38 C.J.S. 980 and 981, §1). The grand jury came to this country as a part of the common law made effective in Florida by the territorial act of Nov. 6, 1829, now appearing as §2.01, F. S. See 24 Am. Jur. 833, §3 and 38 C.J.S. 982 and 983, §1, for the origin and history of the grand jury in this country.

The grand jury has been said to be a legally constituted governmental agency (*Ex Parte Kennedy*, 116 Tex. Cr. R. 33 S.W.2d 443); an instrument through which courts act in the enforcement of the law (*Zinn v. District Court*, 17 N.D. 128, 114 N.W. 475, text 476); a separate tribunal whose proceedings are secret (*Barnes v. State*, Tex. Cr. App., 116 S.W.2d 408, text 409); an appendage of the court (*Re: Present by Grand Jury*, DC Del., 44 Fed. Supp. 375, text 377); a constituent of the court whose proceedings are a part of the proceedings of the court

(*People v. Naughton*, N.Y. 7 Abb. Pr. (n.s.) 421, text 423); an arm or agency of the court (*State v. McClure*, 325 Mo. 1228, 31 S.W.2d 39, text 42); a part of the machinery of government (*People v. Trieber*, Cal. App., 163 P.2d 492, text 497); a part of a court having criminal jurisdiction (*People v. Conzo*, 301 Ill. App. 524, 23 N.E.2d 210, text 214); in some aspects a part of the court and in others separate from the court (*People v. Sweeney*, 229 Mo. App. 759, 84 S.W.2d 659, text 664); a tribunal organized to make inquiry (*State v. Shepherd*, 129 Iowa 705, 106 N.W. 190, text 191); an inquisitorial and accusatorial body, court connected, but not of itself a judicial body or tribunal (*State v. Winsett*, Del. Super., 200 A.2d 692, text 694).

From the above and foregoing I am of the view that a grand jury in Florida is a public agency, although an adjunct of the circuit court, for certain purposes, but in the nature of an independent body for many other purposes, although under the general supervision of the court for other purposes. Grand jurors are within the purview and intention of §40.24, F. S., when in attendance as members of the grand jury and when traveling from their homes to the courthouse and returning to their homes. However, said §40.24, F. S., does not seem to be applicable to members of the grand jury when sent on other, but connected missions, by the state attorney or assistant state attorney, or by the grand jury itself, including missions such as that mentioned in the above-stated question. Such a person would appear to be an authorized person within the purview and intention of §112.061(2) (e), F. S. The juror mentioned in the above question, whether directed to make the trip by the state attorney or by the foreman of the grand jury, appears to have been an authorized person within the purview and intention of the said §112.061(2) (e), F. S., and should be paid on that basis.

067-20—April 26, 1967

PUBLIC OFFICERS AND EMPLOYEES

MONROE COUNTY ANTIMOSQUITO DISTRICT—PER DIEM AND TRAVEL EXPENSES OF BOARD OF COMMISSIONERS—HEALTH INSURANCE FOR DISTRICT EMPLOYEES

To: *Robert M. Lee, Director, Monroe County Antimosquito District, Stock Island*

QUESTIONS:

1. Are members of the board of commissioners of the Monroe County Antimosquito District entitled to be paid per diem and travel expenses pursuant to Ch. 112, F. S., or pursuant to Ch. 65-1913, Laws of Florida?

2. Is said board of commissioners authorized to provide health insurance for its employees out of tax funds?

Section 112.061, F. S., governs the per diem payments to public officers and employees and subsection (1) (b) 2., provides that the provisions of any special or local law shall prevail over any conflicting provisions contained in §112.061, F. S., to the extent of the conflict. Chapter 65-1913, Laws of Florida, a special act, provides in part as follows:

Said Commissioners may be reimbursed from time to time for any moneys expended by them personally in official travel for the district or for attendance at meetings of the commission, provided that payment for such travel shall be at the rate of ten cents (10¢) per mile and payment of per diem of actual expenses shall be at the rate of Twenty Dollars (\$20.00) per day. (Emphasis supplied.)

It is my opinion that the legislature intended by the language above quoted that the commissioners' per diem should be paid for actual out-of-pocket expenses up to \$20 per day. Such expenses should be itemized in a supporting travel voucher for auditing purposes. Of course, this can be paid only when authorized by resolution of the board and for the purposes defined as official travel in Ch. 65-1913, Laws of Florida.

The question of whether your board has authority to provide health insurance to its employees out of tax funds is determined from the language contained in §112.12, F. S., which provides:

Each county, county board of public instruction, governmental unit, department, board, or bureau, of this state may pay out of any of its available funds all or part of the premiums or charges for health, accident, or hospitalization insurance provided for its employees pursuant to the provisions of §112.08.

If the Monroe County Antimosquito District is not a governmental unit or board of the state and not an agency of the county, then there exists no authority for said district to pay health premiums from the tax funds received by the district. Chapter 26042, Laws of Florida, 1949, authorizes the creation of an antimosquito district in Monroe County upon a vote of the qualified electors. Upon favorable vote, the governor shall appoint within 30 days 3 citizens to constitute the board of commissioners of the district, who are thereafter elected. Each commissioner is required to give a surety bond and shall thereafter elect a chairman, vice-chairman and secretary-treasurer. The board is authorized to do all things necessary for the control and elimination of mosquitoes and to provide for the construction and maintenance of canals, ditches, drains, dikes, and fills, and to install and maintain pumps, excavators and other machinery and equipment. Section 14 of Chapter 26042, Laws of Florida, 1949, specifically provides that: "The Board shall have all powers of a body corporate, including the power to sue and be sued, as a corporation in said name in any Court; to contract, to adopt and use a common seal and alter same at pleasure; to purchase, hold, lease, and convey such real estate and personal property as said Board may deem proper to carry out the purpose of this Act; to acquire, by gift, real estate, personal property and moneys to employ a field director and such trained personnel, clerical, legal or otherwise, and laborers as may be required." The board is further authorized to promulgate rules and regulations not inconsistent with the act.

The tax moneys received by the board shall not exceed \$25,000 and shall be levied by the board and shall be assessed and collected by order of the county commissioners. The comptroller shall assess and levy on the public utility properties within his jurisdiction. Such tax moneys are to be remitted to the treasurer of the board and held by the treasurer to the credit of the board and paid out by him as ordered by the board.

This question as to various districts established by a special legislative act has been raised on several occasions in determining whether or not officers and employees of special districts come within the provisions of §122.02, F. S., providing for state and county officers and employees retirement system. A portion of §122.02(1), F. S., states that full-time officers or employees are under the retirement system "... who receive compensation for employment or services from any agency, branch, department, institution or board of the state, or any county of the state. . . ." Opinions from this office have repeatedly held that special districts established under special acts of the legislature containing provisions similar to those in Ch. 26042, Laws of Florida, 1949, which created the antimosquito district in Monroe County, are not agencies of the county but are independent agencies providing specific services in a

limited area. See AGO's 058-201, 058-208 and 058-256. It is, therefore, my opinion that the Monroe County Antimosquito District is not an agency of Monroe County and does not qualify as a governmental unit or board under the provisions of, or for the purposes of §112.12, F. S., and is not authorized to pay from its funds the premiums on district employees' health insurance policies.

067-21—May 5, 1967

LEGISLATION

EFFECTIVE DATE OF SENATE BILL 427, 1965 LEGISLATURE PASSED AT 1967 SESSION (Ch. 67-5) OVER GOVERNOR'S VETO

To: Robert C. Parker, Director, Trustees of the Internal Improvement Fund, Tallahassee

STATEMENT OF FACTS:

Senate Bill No. 427 of the 1965 Legislature (Ch. 67-5), amending portions of Ch. 253, F. S., relating to the Trustees of the Internal Improvement Fund, although passed by the 1965 Legislature, was vetoed by Governor Burns. The secretary of state, pursuant to the Constitution, submitted the bill to the 1967 Legislature, and it has now passed both houses and has been filed in the office of the secretary of state. The bill provides, by §3, that the act shall take effect on July 15, 1965.

QUESTION:

Based on the statement of facts set forth above, what is the effective date of S. B. 427, 1965 Legislature?

Section 28, Art. III, State Const., provides for submission of a vetoed bill to the next session of the legislature, and provides: "... and if the same shall receive two-thirds of the votes present it shall become a law."

Section 18, Art. III, State Const., provides for the effective date of acts in this language:

No law shall take effect until sixty days from the final adjournment of the session of the Legislature at which it may have been enacted, unless otherwise specifically provided in such law.

I do not consider the provisions of §28 above noted to mean that the act shall immediately become (an effective) law. Rather, this provision should be held to mean the act shall become a law on the effective date specially provided for therein, or sixty days after the final adjournment of the current session.

Considering now the express terms of the act that the same should take effect on July 15, 1965, I note that there is no prohibition in our Constitution against retroactive or retrospective enactments. [State *ex rel.* Jacksonville Gas Co. v. Lee, Comptroller (1933), 150 So. 225.] However, statutes are regarded as prospective in their operation unless the language of the statute requires it to be given a retroactive operation. [Laney v. Board of Public Instruction (1943), 15 So.2d 748.]

... it is a well-settled and fundamental rule of statutory construction, variously stated, that all statutes are to be construed as having only a prospective operation, and not as operating retrospectively. ... Whether a statute operates prospectively, or retrospectively or retroactively, is a matter of legislative intent. ... More specifically, statutes generally will be held to operate prospectively unless the purpose and intent of the legislature to give them a retrospective effect clearly appears. ... 82 C.J.S., Statutes, Sec. 414, p. 981, *et seq.*

Here, the 1965 Legislature anticipated the passage of the bill during the 1965 Session, and consequently provided for an effective date subsequent to the regular session. It has been aptly said that:

Where the legislature fixes an effective date for a statute, but the statute is not approved until after such date, the effective date clause becomes void by reason of such circumstance, and the act goes into effect at a date subsequent to that fixed. . . . 82 C.J.S., Statutes, Sec. 400, p. 963.

I cannot ascribe to the action of the legislature any intent for the act to be retroactive; the day certain fixed by the act has long since passed, and to hold this to be the effective date would be to make void many of the lawful acts of the Trustees of the Internal Improvement Fund, surely never envisioned by the 1965 or the 1967 Legislatures.

Consequently, it is my opinion that S. B. 427, 1965 Session, vetoed by the governor, and whose veto was overridden by the 1967 Legislature, takes effect sixty days after final adjournment of the 1967 Session of the Legislature.

067-22—May 5, 1967

EDUCATION

ADMINISTRATION OF CAPITAL OUTLAY AND DEBT SERVICE SCHOOL FUND PURSUANT TO §18, ART. XII, STATE CONSTITUTION

To: *Ernest Ellison, State Auditor, Tallahassee*

QUESTION:

Does §18, Art. XII of the State Constitution prohibit the placing of the first proceeds of revenues derived from the licensing of motor vehicles in the county capital outlay and debt service school fund in the state treasury and the annual distribution of such revenue on a fiscal year basis, rather than on a calendar year basis?

The constitutional provision in question earmarks sufficient amounts of the motor vehicle license revenues to meet the requirements of the minimum foundation program for capital outlay, and provides for the distribution to the several county school systems annually of the first proceeds of the revenues derived from the licensing of motor vehicles at the rate of \$400 per instruction unit, in the ratio of the number of instruction units in each county in each year computed in the manner and according to the formula prescribed in the State Const.

The State Const. further provides that such funds so distributed are to be administered by the State Board of Education, and that such board shall have the management, control and supervision of the proceeds of the first part of the revenues derived from the licensing of motor vehicles. The state board is authorized to issue bonds for school building purposes at the request of the several county boards of public instruction on behalf of which any such obligations are to be issued.

In Ch. 63-528, Laws of Florida, provision was made for moving forward by one month each year the renewal dates for motor vehicle licenses until 1970, at which time the renewal date will be established on July 1 of each year. During this transition period, the collections of these revenues have followed and will continue to follow a new seasonal pattern each year until the year 1970. This change in collection dates of these revenues has necessitated an adjustment and change in the operations of the school trust fund and in the procedures for distributing

these revenues to the several counties in order that debt service for State Board of Education bonds which have been issued against these revenues and other requirements may be met on time. It is my understanding that absent the change to a fiscal year basis for the collection, depositing and distribution of these revenues, the collection and distribution of the revenues would be insufficient to meet the requirements of the capital outlay and debt service school trust fund and its operations, as required under the outstanding bonding contracts, due to the aforesaid changing seasonal pattern of motor vehicle license renewals. In the exigencies of the situation in which the State Board of Education was placed as a consequence of the enactment of Ch. 63-528, and the change in the renewal dates for motor vehicle licenses, it had little or no alternative but to change to a fiscal year basis for the collection and distribution of the first part of the revenues derived from the licensing of motor vehicles in order to meet debt service requirements of its outstanding school building obligations and to protect the credit of the state and the national ratings of its school bonds. It has not been demonstrated to me, nor do I feel, that the board of education has collected or derived a greater amount of these revenues than it was or is entitled to under the constitutional provision, nor that the aforementioned shift to a fiscal year basis has resulted in any additional burden to the general revenue fund or deprived it of any proceeds from these license taxes to which it was entitled.

In consideration of the foregoing, I am of the opinion that §18, Art. XII, State Const., does not prohibit the placing of the first part of the revenues derived from the licensing of motor vehicles in the capital outlay and debt service school fund or the distribution of such revenues among the several counties of the state on a fiscal year basis, nor does it void or nullify the existing employment of the fiscal year procedure by the state board in the collection, depositing and distribution of these revenues and in the operations of the school trust fund subject, however, to the condition that in no event shall the State Board of Education collect or receive more than 35 annual payments or installments of the first proceeds of such revenues, to the extent and in the amount and according to the formula fixed and prescribed in the State Const., during the period commencing Jan. 1, 1965, and ending at midnight on Dec. 31, 1999. So long as the foregoing procedure is followed and so long as the requirement of the above condition or proviso is met, I find no constitutional infirmity in the fiscal program and procedure being followed by the State Board of Education.

To the extent that anything said in AGO 067-15 might be deemed or construed to conflict with the view expressed herein, said opinion is hereby modified so as to be compatible with and to conform to the observations herein expressed.

067-23—May 18, 1967

COUNTY OFFICIAL BOOKS AND RECORDS

INITIATION, PREPARATION AND PROCESSING OF FINANCIAL RECORDS OF PUBLIC SCHOOL INSTITUTIONS PRIOR TO SUBMISSION TO OFFICE OF COUNTY SUPERINTENDENT

To: *Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee*

QUESTION:

May the county board of public instruction and the county superintendent authorize any or all of the financial records and accounts required in §230.23(10)(b), F. S., and §230.33-

(12)(d),(f),(g), F. S., to be initiated, prepared and processed at a junior college or other location apart from the office of the county superintendent; provided that permanent financial records are filed in the office of the county superintendent as required in §4, Art. XVI, of the State Const.; and provided further that provisions of Ch. 237, F. S., relating to the expenditures and approval of vouchers are met?

Section 4, Art. XVI, of the State Const., provides:

SECTION 4. . . . All county officers shall hold their respective offices, and keep their *official* books and records, at the county seats of their counties. . . . (Emphasis supplied.)

It has been held by the Supreme Court that this section was intended to mean that official meetings for transaction of business by county commissioners and boards should be publicly conducted at a known place in the county seat. *Motes v. Putnam County*, 196 So. 465. It follows that by this section, with respect to official books and records, it was intended they be kept at a known place in the county seat, readily available for meetings and for valid public use. Section 230.29, F. S., was enacted pursuant to said constitutional provision requiring the county superintendent to have his office at the county seat.

In the case of *Mack v. Carter*, 183 So. 478, the Sup. Ct. held an act in violation of said §4, Art. XVI, that authorized circuit court to be held in a city not the county seat. The court said:

If terms of the Circuit Court are to be held at St. Petersburg, it would necessitate the removal of these and other volumes constituting their [Clerks of Circuit Court] "official books" to that point.

It is clear the State Const. will not permit "the official books and records" of the county superintendent to be kept outside the county seat. Therefore, the question is whether or not the initiation, preparation and processing of the records and accounts required under the sections of the statutes named is keeping the official books and records of the county superintendent at a place outside the county seat, contrary to §4, Art. XVI, of the State Const.

Section 230.23(10)(b), F. S., requires the county school board to cause to be prepared, approve, and have submitted to the state superintendent the annual school budget. Section 230.33(12)(d), F. S., requires the county superintendent to keep an accurate account of all funds which should be transmitted to the county board for school purposes; §230.33(12)(f), F. S., requires the county superintendent to keep or have kept accurate records of all financial transactions; and §230.33(12)(g), F. S., requires said superintendent to prepare, at least monthly, payrolls and statements of account due to be paid by the county board, and prepare monthly statements showing receipts, balances, and disbursements to date. In order for the county superintendent to establish and keep such records as his "official books and records" he necessarily must have information compiled and prepared by the administrative staff of the county school institutions, including junior colleges. Hence, the records prepared and kept by and in the several schools within the county do not become "official books and records" of the superintendent until such or the required information therefrom has been submitted to the superintendent. When such submission has been so made and accepted it then becomes a part of the "official books and records" of the county superintendent. Prior to becoming a part of the superintendent's official records there is no requirement that the records maintained in the several schools of the county be kept within the county seat.

Your question is answered in the affirmative to the extent that necessary information required for records and accounts included in your question may be initiated, prepared and processed at county school institutions, as they may require, outside the county seat, but upon submission thereof to the county superintendent and their being made a part of or incorporated in his books and records, such information becomes "official books and records" of the county superintendent and shall be kept by him in the county seat.

067-24—May 19, 1967

COUNTY PUBLIC SCHOOL SYSTEM

JUNIOR COLLEGES—APPOINTMENT AND REAPPOINTMENT OF PRESIDENTS

To: *Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee*

QUESTIONS:

1. Is the appointment, reappointment, suspension and dismissal of junior college presidents governed by the same law applicable to principals and supervising principals or is there some other standard by which junior college presidents must be governed?

2. Section 230.23(5)(c) and (d), F. S., provides the time limitations within which actions must be taken by trustees and county boards with regard to the appointment of instructional staff and other employees. Both of these paragraphs provide for such action at a certain time "before the close of school during any year." By what standard is the close of school determined, and is the close of school different for junior colleges from that pertaining to the kindergarten through twelfth grade levels? In the case of a junior college president may the termination of his annual contract be considered the close of school?

3. The State Board of Education Regulations, §130-8.05(3) provides that the county board shall reappoint a junior college president upon the recommendation of the junior college advisory committee with concurrence of the county superintendent. If the advisory committee affirmatively refuses to make a recommendation, may the county superintendent recommend reappointment upon his own motion?

4. If the junior college advisory committee fails to make a recommendation with regard to reappointment of a junior college president, and if the county superintendent does not make a recommendation upon his own motion, may the county board act upon its own motion with regard to the reappointment of a junior college president, such action pursuant to §231.35-(2), F. S.?

5. If the junior college advisory committee affirmatively refuses to make a recommendation with regard to the reappointment of a junior college president, and if the county superintendent does make a recommendation upon his own motion, is there any requirement for showing good cause if the county board rejects the recommendation of the county superintendent?

6. What standards are used in determining good cause when the county board rejects the recommendation of the county superintendent for the reappointment of a junior college president? Is it necessary to determine one of those

causes itemized in §231.36(3), F. S., or is some lesser standard applicable in the case of failure to reappoint?

Statutory authority for the establishment of junior colleges as a part of the county school system is contained in §§230.0100-230.0120, F. S. As part of the county school system junior colleges are under the overall supervision of the State Board of Education. Section 230.0100, F. S., establishes the State Junior College Board, which, subject to the approval of the State Board of Education, is responsible for the establishment of statewide policy regarding the operation of public junior colleges and for determining ways and means to effect articulation and coordination of junior colleges with other institutions.

Within the counties the county boards of public instruction, subject to applicable provisions of law and subject to rules and regulations properly adopted by the State Board of Education, exercise general supervision over junior colleges.

Section 230.0103, F. S., provides that for each junior college established or acquired by a county board an advisory committee shall be appointed to make recommendations to the county board relating to personnel, curricula, finance and policies in general which it deems to be in the best interest for the junior college.

Each junior college is directed by a president as provided by §230.0102, F. S., who is responsible through the county superintendent to the county board of the county. Section 230.0102(2), F. S., provides that when a vacancy exists in the presidency of a junior college the county board shall employ a qualified person who has been approved by the State Board of Education to fill the position. Implicit in the requirement for approval of appointments of presidents by the State Board of Education is the authority of the State Board of Education to establish rules and regulations as to procedures for appointment, the compliance with which rules and regulations would be conditions precedent to the approval of a president by the state board. Basic rule-making authority of the State Board of Education is derived from the provisions of §229.051, F. S.

Pursuant to such authority the State Board of Education has adopted State Board of Education Regulation §130-8.05, which reads as follows:

Qualifications and employment of junior college presidents.—The president of the junior college shall hold a master's or higher degree, shall hold a valid Florida post graduate or higher certificate, and shall meet the additional qualifications which shall be prescribed by the advisory committee and the county board of the county of location. The following procedure shall be followed in employing a junior college president:

- (1) The advisory committee of the junior college with the concurrence of the superintendent of the county of location shall recommend a qualified individual to the county board of the county of location. Before making this recommendation, the advisory committee and the superintendent shall seek out and interview persons who demonstrate the highest qualifications of educational leadership. The committee shall pay particular attention to the candidate's experience in junior college or related fields, to his education, to his possession of a broad understanding of the community junior college program, and to his demonstrated leadership ability.

- (2) The county board of the county of location, after considering the recommendation referred to in (1) above, shall

approve the recommendation or reject it for good cause. If rejected, another recommendation shall be made as prescribed in (1); if approved, the county board shall submit the name of the candidate to the state junior college board for its recommendation to the state board of education. After approval by the state board of education, the county board of the county of location shall appoint the candidate president of the junior college.

(3) Reappointment of a junior college president shall be by the county board upon the recommendation of the junior college advisory committee with concurrence of the superintendent as in the initial appointment. The recommendation of the junior college president shall not be subject to review by trustees.

(4) The junior college president shall be entitled to a contract as provided in Section 231.36, Florida Statutes. Procedure for dismissal of a junior college president shall follow the procedure prescribed by law with the additional requirement that approval of the State Board of Education shall be necessary before the dismissal may be effected.

The adoption of the foregoing rule has evidenced the philosophy of the State Board of Education to place strong reliance upon local non-political junior college advisory committees in determining personnel and other policy matters.

It will be further noted that junior college presidents are entitled to contract as provided by §231.36, F. S. Essentially, this means that a junior college president, as other members of the institutional or administrative staff within the county school system, is given an annual contract until a probationary period of service is completed, after which he is entitled to a continuing contract.

Question 1 relates to the law applicable to appointment, reappointment, suspension or dismissal of a junior college president. For clarification, a definition of these terms is appropriate.

"Appointment" refers to the initial employment of a person as a junior college president by the county school board. Such appointment could either be under a one-year contract if the appointee did not at that time qualify for a continuing contract, or, if upon the initial appointment of a person as a junior college president he is otherwise qualified for a continuing contract, such appointment would be made on a continuing contract basis.

"Reappointment" would refer to the granting of a new contract, either annual or continuing, to a person upon the expiration of an annual contract.

"Suspension" and "dismissal" refer to the involuntary termination of a junior college president's contract (1) prior to its expiration, if an annual contract, or (2) at any time if it is a continuing contract.

Appointment and reappointment of junior college presidents is governed by §230.0102, F. S., and by §130-8.05, State Board of Education Regulations, and not by the law applicable to principals and supervising principals.

As stated above, upon the appointment or reappointment of a junior college president he is entitled to a contract as provided by §231.36, F. S. While under such contract a junior college president could be suspended or dismissed in the manner set forth in §231.36(3), F. S., on grounds of immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, drunkenness, or conviction of a crime involving moral turpitude.

Question 2 inquires first as to what standard is "the close of school" determined for junior colleges and for schools from the kindergarten through twelfth grade level. I am informed by your office that each junior college has been granted specific approval to operate on a year-round basis. This year-round operation has been endorsed by the legislature in appropriating funds for the year-round operation of junior colleges.

The close of school would come at the end of the school year. Traditionally, school years throughout the United States begin with the Fall Term, which usually commences in August or September of each year, with the Fall Term being the beginning of the school year. The school year of a junior college operating on a year-round basis would end at the end of the term immediately preceding the beginning of the Fall Term.

Section 228.041(19), F. S., defines the school year as a period during which the schools are regularly in session for a minimum of 180 days for pupils, plus periods for preschool and postschool conferences during any school fiscal year beginning on or after July 1 and ending on or before June 30. Therefore, for schools not operating on a year-round basis the end of the school year would be the end of the postschool conference period prior to June 30 of each year.

In question 2 you further ask whether, in the case of a junior college president, the termination of his annual contract may be considered the close of school. Inasmuch as the appointment and reappointment of junior college presidents are governed by the statutes and rules and regulations set forth above preliminary to my answer to question 1, the close of school is not relevant to a junior college president's contract.

Question 3 is answered in the negative. Section 130-8.05(3) of the State Board of Education Regulations must be complied with in the reappointment of a college president. When a junior college president is serving under an annual contract, a vacancy in the office of president will occur unless such president is reappointed pursuant to State Board of Education Regulations §130-8.05(3) or a new president is appointed pursuant to the provisions of State Board of Education Regulations §130-8.05(1) and (2). These regulations place an affirmative duty upon the advisory committee to make a recommendation for president which can be concurred in by the county superintendent. If the advisory committee affirmatively refuses to make such a recommendation, its members are neglectful of the duties of office imposed upon them and they should be removed.

Because of the answer to question 3 and the explanation therein contained, question 4 is answered in the negative.

In question 5 you ask if the junior college advisory committee affirmatively refuses to make a recommendation with regard to the reappointment of a junior college president, and the county superintendent does make a recommendation upon his own motion, is there any requirement for showing of good cause if the county board rejects the recommendation of the county superintendent. Under State Board of Education Regulations §130-8.05, and as explained above, the county superintendent is without authority to make a recommendation upon his own motion absent a recommendation from the junior college advisory committee. Such recommendation by the county superintendent being a nullity, no proper matter would be before the county board for its approval or rejection.

Question 6 refers to the rejection of a recommendation of the county superintendent for the reappointment of a junior college president. As pointed out in my answer to question 5 above, the county board is with-

out authority to act on the recommendation of the county superintendent alone. Assuming, however, the junior college advisory committee, with the concurrence of the county superintendent, has recommended either the appointment of a new junior college president upon the expiration of the annual contract of the former junior college president or has recommended the reappointment of the former junior college president, the county school board may take one of the two courses of action set forth in State Board of Education Regulations §130-8.05(2). The county board may either (1) approve the recommendation or (2) reject it for good cause.

You inquire if good cause is limited to those causes itemized in §231.36(3), F. S. Certainly those causes listed in that section, viz: immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, drunkenness, or conviction of any crime involving moral turpitude, would be good cause for rejecting the recommendation of a person found to be guilty thereof. It is conceivable that other causes for rejection than those last enumerated might constitute good cause.

In the case of *State ex rel. Lawson v. Cherry, et al.*, 47 So.2d 769, the Supreme Court of Florida discussed the dignity of the nomination of a supervising principal by school trustees. For the purpose of arriving at an answer to this particular question the nomination by school trustees of a supervising principal is analagous to the nomination by the junior college advisory committee of a junior college president and the power of the county board to reject either nomination would be the same. In the *Lawson* case the court said "their nomination is final unless some moral or professional disqualification is shown."

I am, therefore, of the opinion that the Regulations of the State Board of Education place an affirmative duty upon a county school board to accept the recommendation for appointment or reappointment of a junior college president properly made by the junior college advisory board with the concurrence of the county superintendent unless it can be shown that the nominee is not morally or professionally qualified to perform the duties of a junior college president.

067-25—May 26, 1967

REGULATION OF FISHING AND FISHERIES

DETENTION OF BOAT SEIZED FROM A PERSON CHARGED WITH VIOLATION OF LAWS REGULATING FISHING PENDING OUTCOME OF TRIAL

To: *Richard E. Gerstein, State Attorney, Dade County, Miami*

QUESTION:

Should a boat seized from a defendant charged with violation of law regulating fishing be held by state pending outcome of trial?

You have suggested that I review and reconsider AGO's 056-281 and 058-114 in the light of later legislative changes and revisions in the laws regulating fishing and fisheries in the salt waters of Florida. Section 370.061(1), F. S., provides in part that:

In all cases of arrest and conviction for the illegal taking, or attempted taking, sale, possession or transportation of salt water fish or other salt water products; such salt water products, seines, nets, boats, motors or other fishing devices or equipment, and such vehicles or other means of transportation used in con-

nection with such illegal taking or attempted taking are hereby declared to be nuisances and shall be seized and carried before the court having jurisdiction of such offense, and said court shall order such nuisances forfeited to the state board of conservation immediately after trial and conviction of the person or persons in whose possession they were found. . . . When any illegal or illegally used seine, net, trap, or other fishing device or equipment or illegally taken, possessed or transported salt water products are found and taken into custody, and the owner thereof shall not be known to the officer finding the same, such officer shall immediately procure from the county judge of the county wherein they were found an order forfeiting said salt water products, seines, nets, traps, boats, motors or other fishing devices to the board.

The effect of this statute is to make the salt water products, and the articles and instrumentalities therein enumerated used in connection with the illegal taking or attempted taking of salt water fish or other salt water products, public nuisances. The proscribed apparatus and instrumentalities become nuisances upon their being used in the unlawful taking or attempted taking of fish or other salt water products. Such property is a nuisance at the instant of arrest, as well as at the time of conviction, for the violation of the salt water fishing laws, and by the terms of §370.061, F. S., the conservation officers are commanded to seize such nuisances and to carry or produce the same before the court having jurisdiction of the offenses defined in Ch. 370, F. S., in whose custody such property should remain until the trial of the offender.

The forfeiture of the forbidden apparatus and instrumentalities is conditioned upon the conviction of the individual offender of violation of the fishing laws. Immediately following the trial and conviction of the person or persons in whose possession such nuisances were found, the court having jurisdiction of such offenses must order such nuisances forfeited to the State Board of Conservation. The statute does not seem to bestow upon the court any discretion in the matter of the forfeiture of the condemned apparatus used in illegal fishing in the event of the conviction of the offender. If the accused is acquitted on the criminal charge, the court may not adjudicate a forfeiture of the property seized by the arresting officer and in custodia legis, but such apparatus or property should be released and restored to the owner or owners thereof.

In those cases where the owners or operators of the seized property escape and are not apprehended by the law enforcement officers, or where at the time the unlawfully used property is found and taken into custody by the officers and the owner thereof is not known to the officers finding the same, such officers should immediately procure from the county judge of the county wherein such unlawfully used property was found an order forfeiting such property. In such cases, the county judge has jurisdiction to adjudicate the forfeiture of the illegally used property, and conviction of the owner of the seized property for violation of the fishing laws is not a condition precedent to forfeiture of such property to the board of conservation. In this connection, see *Bruce v. Malloy*, Fla. 1942, 7 So.2d 123, involving a forfeiture under Ch. 13644, Laws of Florida, 1929, the confiscation and forfeiture provisions of which are essentially the same as those contained in §370.061, F. S.

Under §370.021(5), F. S., all conservation officers are constituted police officers with power to make arrests for violations of the laws of Florida and the rules and regulations of the board of conservation under their jurisdiction, and the general laws applicable to arrests by peace officers of the state are also made applicable to such officers. As such

police officers, the conservation officers may arrest without a warrant when there is a misdemeanor being committed in their presence. *Hutchinson v. Lott*, Fla. App. 1959, 110 So.2d 442.

Apart from the confiscation and seizure powers and procedures embodied in §§370.021(5) and 370.061, F. S., a conservation officer, in making an arrest for violation of the salt water fishing laws and regulations occurring in his presence, may lawfully seize and take into custody the property being used in the commission of the offense or which may supply evidence of the offense of which a person is accused, to be disposed of under the direction of the court, and it would be his duty to see that the seized property was safely cared for until the time of trial of the accused, if for no other reason than to protect and preserve the right of the state to forfeiture thereof. Anno: 32 A.L.R. 680; 51 A.L.R. 424; 74 A.L.R. 1387; 82 A.L.R. 782; *Bruce v. Sibeck*, 78 P.2d 741. Also see *Smith v. State*, Fla. App. 1963, 155 So.2d 826, certiorari dismissed; *Smith v. State*, Fla. 1964, 167 So.2d 225; and *Self v. State*, Fla. 1957, 98 So.2d 333, relative to search and seizure incident to lawful arrest without warrant. In such cases, the seized property should also be held by the state pending the outcome of the trial of the accused offender.

With respect to the search, seizure, confiscation, forfeiture and summary disposition of contraband property used in illegal fishing operations generally, see 36A C.J.S. (Fish) 570, §42; 22 Am. Jur. (Fish & Fisheries) 708, §55. As to forfeitures and enforcement thereof generally, see 23 Am. Jur. (Forfeitures & Penalties) 598, *et seq.*

Although not within the scope of this opinion, it may be noted that the authorization and procedures for the confiscation, disposition and sale of perishable products seized when an arrest is made pursuant to Ch. 370, F. S., are provided for in §370.061(2) of the statute. The seizure and forfeiture of vessels, with their cargoes, violating the provisions of the laws relating to oysters and clams, are provided for in §370.16(23) of the statute. The confiscation proceedings against alien vessels, gear and catch in violation of the Florida territorial waters act (§370.21, F. S.) are provided for in said §370.21, which provides that the fine or imprisonment of persons and confiscation proceedings against such vessels, gear and catch prescribed for violations of Ch. 370, shall be imposed for violation of the territorial waters act.

The provisions of former §370.02(11), F. S., are substantially identical to those set forth in §370.061(1), F. S., as now worded. Therefore, what was said in AGO's 056-281 and 058-114 remains applicable and pertinent to the present terms and provisions of the salt water fishing laws and, upon reconsideration thereof, I find no justification to recede from the same, but hereby confirm said opinions.

Your question as to whether a boat seized from a person charged with a violation of Ch. 370, F. S., should be held by the state pending the outcome of the accused's trial is answered in the affirmative.

067-26—June 7, 1967

PUBLIC HIGHWAYS

OCCUPANCY BY PUBLIC UTILITIES—MATTER OF RIGHT OR PRIVILEGE

To: *Bryan W. Henry, Attorney, State Road Department, Tallahassee*
QUESTIONS:

1. Do the public utilities occupying public roads and highways in this state occupy them as a privilege or as a matter of right?

2. Would the answers to the questions propounded to you in AGO 059-80, April 16, 1959, vary where the utility's occupancy of the public highway is based upon a right rather than a privilege; and if so, what would the answer to those questions be where the occupancy of the utility on the public highway is based upon a right and where the utility's occupancy is based upon a privilege?

Questions and answers thereto contained in AGO 059-80 set forth at end of this opinion.

AS TO QUESTION 1:

Generally a telephone or telegraph company cannot occupy or use public streets or highways without legislative authority. (86 C.J.S. 32 and 35, §24). The statutes and laws of the State of Florida have, at least as early as Ch. 782, Acts of 1856, permitted the use of public roads and highways by telephone and telegraph companies, §1 of which chapter has been brought into the Florida Statutes as §362.01, F. S. This act contained the proviso that the posts, wires and fixtures of a telegraph or telephone company "shall not be set so as to obstruct or interfere with the common uses of said roads and highways." This provision appears in said §362.01, F. S. In *Peninsular Telephone Co. v. Marks*, 144 Fla. 652, 198 So. 330, it was held that the privilege granted by said §362.01 to telephone and telegraph companies:

. . . [T]o erect posts, wires and other fixtures for telephone and telegraph purposes on or beside any public road, highway or street contemplates that the same shall be erected and maintained in such a manner as not "to obstruct or interfere with the common uses of said road, highway or street." . . . one of the *secondary* purposes for which a street or highway could be used was for the erection and maintenance of posts, wires and fixtures commonly used by telephone and telegraph companies, but the use thereof on the streets and highways was so restricted that the appliances and fixtures should *not* obstruct or interfere with common uses of the streets and highways. (Emphasis supplied.)

In this case the court further observed that:

It was never contemplated that telephone and telegraph companies would erect and maintain posts and other fixtures on streets or highways so as to obstruct or interfere with the common use thereof.

In *Southern Bell Telephone and Telegraph Company v. State*, Fla., 75 So.2d 796, text 798, the court, discussing the proviso in §362.01, F. S., prohibiting obstruction or interference by the public utility, said "with the common uses of said roads and highways."

It is doubted that telephone and telegraph companies could legally use the rights-of-way of state, county and municipal highways, roads and streets, absent statutes such as §362.01, F. S., or other permission legally obtained.

This conclusion is fortified by §§338.16-338.20, F. S., which provide for a limited use of public highways, roads and streets by utility companies for their electric transmission, telephone or telegraph line, pole lines, poles, railways, ditches, sewers, water, heat or gas mains, pipelines, fences, and similar uses, in addition to the uses mentioned in §362.01, F. S., by telephone and telegraph companies.

When we take into consideration the fact that no compensation is required of a telephone or telegraph company for its use of the public highways, roads and streets under §§362.01 and 338.17-338.20, F. S., I

am of the opinion that their use of the said highways, roads and streets for such purposes, is a mere privilege and not a matter of right. This answers question 1.

AS TO QUESTION 2:

This question relates primarily to the question of the state, county or municipality, as the case may be, reimbursing telephone and telegraph companies for the expenses of moving or removing their posts, wires and other fixtures, when such moving or removing of such property becomes necessary in connection with the repair or reconstruction of public highways, roads or streets. Except for §§338.17-338.21, 362.01, F. S., and like and similar statutes and laws, public utilities occupying a part of public roads and highways, including municipal streets, without the consent of the public, would have the status of trespassers or unlawful occupants. In *Peninsular Telephone Co. v. Marks*, *supra*, the court held that the primary purpose of rights-of-way for highways, roads and streets was for the use of the traveling public and the secondary purpose was the use of such rights-of-way by the public utilities. Such use by public utilities "is secondary and restricted to the extent that such facilities should not interfere with the common use thereof," that is, the use of the way by the public. (*Southern Bell Telephone and Telegraph Co. v. State*, Fla. 75 So.2d 796, text 799).

Whether a public utility occupies a portion of a highway, road or street right-of-way as a matter of right or as a privilege, it still occupies the same as a secondary and not a primary user, so that its use of the said right-of-way is in subordination to the use of the public as a highway, road or street. The status of the public utility is that of a subordinate user while that of the public is a primary or superior user whose rights of occupancy are superior to those of the utility. Question 2 is answered in the negative.

This opinion should be read and construed with and in the light of AGO 059-80 of April 16, 1959.

067-28—June 19, 1967

COURTS—EXPENSES OF OFFICERS

LIABILITY OF COUNTY FOR EXPENDITURES FOR LODGING AND MEALS FURNISHED BAILIFFS ATTENDING JURY DURING CRIMINAL TRIAL

To: *Thomas C. Britton, County Attorney, Miami*

QUESTION:

Is a county authorized by law to pay from county funds charges made for lodging and meals furnished to bailiffs in charge of or attending a jury kept together during a criminal trial by order of the trial judge?

Under our statutes the sheriffs are made the executive officers of the circuit courts and criminal courts of record of the several counties. (§§26.49, 32.26, F. S.)

Section 919.01(1), F. S., provides that the sheriff or a bailiff shall be sworn to take charge of the jury; and that when required by order of the court, the sheriff shall provide juries with meals and lodging. Subsections (2) and (3) of this section make no mention of bailiffs.

The several sheriffs are charged with the duty of attending all terms of the circuit court and criminal court held in their counties. (§30.15(4), F. S.)

The fees that may be charged by sheriffs for "attendance on all

courts for each court per day" and for "bailiffs, all courts, per day" are fixed by statute at \$8 in each such instance. (§30.23, F. S.) Being a creature of the statute, a sheriff's compensation may be regulated as to amount, time, and manner of payment as the legislature sees fit to direct. *Sweat v. Waldon* (Fla. 1936), 167 So. 363, 364. Fee statutes are to be strictly construed and none allowed except where clearly provided by law. *Bradford v. Stoutamire* (Fla. 1948), 38 So.2d 684, 685. Public officers have no legal claim for legal services rendered, except to the extent compensation is provided by law and, when no compensation is provided for, rendition of service is deemed to be gratuitous. *State v. Reardon* (Fla. 1934), 154 So. 868, 871; *Rawls v. State* (Fla. 1929), 122 So. 222. Substantially the same rule obtains in the State of Alabama, and the Alabama court has held that although allowance for the meals of a bailiff in charge of or attending a jury kept together during deliberation by order of the trial judge might not be a fee or cost, strictly speaking, it would be an allowance to him in addition to his regular compensation for which express statutory authority would be required. *Jefferson County v. Capanes* (Ala. 1938), 179 So. 637.

The Florida Court has held that under our statutes making sheriffs the executive officers of the courts, and requiring their personal attendance thereon, it is one of their duties to take charge of and to guard and protect juries from all outside communications and influences while deliberating on their verdicts. The sheriffs can, and usually do, perform this duty through deputies who, in the performance of it, are called "bailiffs." "Bailiffs," so called, who attend upon the courts, taking charge of their juries, serving process and performing other duties and functions, do nothing more than perform those duties that devolve upon the sheriff; and in the performance of them, they act in the place and stead of the sheriff and must get their authority to do so from the sheriff by his appointment. It is the duty of the sheriff, when he cannot attend to such duties in person, to appoint deputies to attend upon the terms of court; and when such deputies are put in charge of juries, the term "bailiff" is applied to them. They are nonetheless deputies of the sheriff, however, in the performance of such duty even though they be deputized by the sheriff for that specific duty alone. It is not within the province of the court to appoint them. *Nicholson v. State* (Fla. 1896), 20 So. 818; also see *Owens v. State* (Fla. 1914), 67 So. 39, 40.

The question of the authority of a county to pay for the board of bailiffs directed by the court to remain with a jury ordered by the court to be kept together was passed upon by the Supreme Court of Florida in the case of *County of Nassau v. Downie*, 16 Fla. 171, wherein during the trial of a capital felony case the jury was kept together by order of the court, and under order of the court, the sheriff furnished board to the jury and to 2 bailiffs in charge of the jury. The sheriff incurred obligations totaling \$618.30 for some 13 days "board" of the jurors and bailiffs, his bill therefor being approved by the trial judge. The bill not having been paid, an action of assumpsit was brought against the county. Judgment was recovered against the county, and the county appealed. The question before the court on appeal was whether the county was liable for such bill. In reversing the judgment, as to the matter of the board of the bailiffs, the court held as follows:

Under Chapter 1981, page 36, Acts of 1874, the law controlling the subject, the sheriff is allowed "for actual and necessary expenses incurred in the arrest, safekeeping or punishment of prisoners or criminals, such allowance as either the judge or the justice from whose court the process issues, shall deem just; provided, however, that there shall not be allowed for

bailiffs more than one dollar per day." . . . this is the only statute then controlling the subject, . . . Under this act it is contemplated that the bailiff will board himself. The sheriff, as the representative of the county or State, (it is unnecessary to decide which,) is authorized to employ a bailiff at a stated price. The expense of the board of this bailiff is a necessary expense of his own. It is no more an expense of the court, contingent or otherwise, within the meaning of the statute, than is the board of the sheriff or clerk. The sheriff is authorized to incur expense for the per diem of a bailiff; he is not authorized to pay a per diem and his board. This is a charge not authorized by law, and no officer can bind either the State or county, except where there is authority, either expressed or necessarily implied, given by law to make the contract sought to be enforced.

Since the County of Nassau v. Downie decision, there does not appear to have been enacted any statute expressly authorizing the payment of the meals and lodging of bailiffs in charge of or attending juries during criminal trials. It therefore appears that such charges are not authorized by law. Accord, Jefferson County v. Capanes (Ala.), *supra*; McIntosh County v. Whitaker (Okla.), 158 P. 1136; State v. Police Comrs. Bd. (Mo.), 82 S.W. 960; 15 C.J. 873; 21 C.J.S. 222. My predecessor in office, Attorney General Cary D. Landis, followed the Downie case, *supra*, in his opinion of Sept. 2, 1936, reported at p. 688, Biennial Report of the Attorney General, 1935-1936.

There is authority in other jurisdictions to the effect that a court has inherent power to direct the furnishing of meals, lodging, and transportation to and from the lodging place of the trial jury in a criminal case and to the bailiff in charge thereof, regardless of any statutory authority, as regards the liability of the county for such services. See Hart Bros. Co. v. Los Angeles County, 82 P.2d 221; Noble County Council v. State, 125 N.E.2d 709; also see 21 C.J.S. 219, 221. However, implicit in the case of Nassau County v. Downie, *supra*, is the holding that there was no authority implied by law to contract for the furnishing of meals and lodging to bailiffs in charge of or attending juries in criminal trials at the expense of the county, nor any inherent power to allow the sheriff an additional allowance or fee for such expenses above those fees and allowances prescribed by the statute for attendance on the court and for services as a bailiff of the court. It may be that in light of the long standing practice in the courts in authorizing or directing such expenditures, to which you refer in your inquiry, and the necessity therefor in the conduct of criminal proceedings, the courts would today recede from or alleviate the harsh rule of County of Nassau v. Downie, *supra*, but any such determination of the court's inherent power to determine the necessity for, and to direct the furnishing of meals and lodging to bailiffs in charge of trial juries must be made by the courts in appropriate legal proceedings to test the validity of charges made for such services and the authority of the court or the sheriff to make the same a proper charge against the county. Be that as it may, in the present posture of the law of Florida on this matter, and in the absence of any statute making provision for the furnishing of meals and lodging to bailiffs when attending or in charge of criminal juries, such charges do not appear to be authorized by law and the county is not liable therefor.

In accordance with your request that I advise the State Auditor and the Clerk of the County Commission as to whether such expenditures are lawful county obligations, I am forwarding copies of this opinion to

such persons, as well as to the senior judges of the Circuit Court and Criminal Court of Record.

067-29—June 19, 1967

CRIMINAL PROCEDURE

PRELIMINARY HEARINGS—CONSTRUCTION OF §§902.01 AND 909.04, F. S.

To: Zell Davis, Jr., Assistant State Attorney, West Palm Beach

QUESTIONS:

1. Does §902.01, F. S., prohibit the Circuit Court from holding preliminary hearings prior to indictment of defendants charged with having committed capital offenses?

2. Does §909.04, F. S., make it mandatory that the Circuit Court allow a second preliminary hearing where a person charged with a crime may have received a preliminary hearing pursuant to §902.01, the defendant then indicted and in custody, confined to jail for more than 30 days after his arrest?

3. Assuming defendant was indicted without preliminary hearing provided for under §902.01 and has been held in excess of 30 days, would he be entitled to a preliminary hearing under §909.04 as a matter of right?

AS TO QUESTION 1:

In *Ex Parte Sirmans*, 116 So. 282, it appears that, after holding a preliminary hearing, the county judge bound Sirmans over to the circuit court on a murder charge and set bail which Sirmans posted; that thereafter the circuit judge issued a warrant for Sirmans' arrest on account of the same alleged murder; and that Sirmans applied for and obtained a writ of habeas corpus and on final hearing the same circuit judge (who had jurisdiction to try the murder charge) remanded him to custody.

Sirmans sued out a writ of error to the Supreme Court of Florida, which reversed. At that time, §36, Art. V, State Const., provided that: "All judicial officers of this state shall be conservators of the peace." (Emphasis supplied.) In disposing of the case, our Supreme Court said:

... The court will take judicial cognizance of the fact that the county judge has jurisdiction as a committing magistrate in all felony cases arising within his county, and that Glades County is within the Twelfth Judicial Circuit of Florida, and Hon. George W. Whitehurst is circuit judge of that circuit, and that circuit judges, *AS CONSERVATORS OF THE PEACE*, are vested with the power and authority of committing magistrates. (Emphasis supplied.)

The Supreme Court said that all committing magistrates within the territorial jurisdiction of each are of equal dignity as such magistrates, and stated the rule to be that in case of concurrent jurisdiction in different tribunals, the one first exercising such jurisdiction acquires control to the exclusion of the other. The Court went on to rule that the judgment of the county judge holding that Sirmans was entitled to bail was *res adjudicata* until a change of conditions was shown or until another court of competent jurisdiction acquired jurisdiction by the filing of an indictment or information. The importance of the

Sirmans case, insofar as the present question is concerned, lies in the fact that it unequivocally stands for the proposition that a circuit judge, as conservator of the peace, has the power and authority of a committing magistrate, even in a case which he is empowered to try and determine.

Thereafter, the legislature enacted §902.01, F. S., which reads as follows:

902.01 Duty of magistrate.—When the defendant is brought before the magistrate upon an arrest, either with or without a warrant, on a charge of having committed an offense which the magistrate is not empowered to try and determine, the magistrate shall immediately inform him:

- (1) Of the charge against him.
- (2) Of his right to the aid of counsel during the preliminary examination,
- (3) Of his right to waive such examination, and
- (4) Of his right to refuse to testify, and also caution him that in the event he does testify, anything which he says may be used against him in a subsequent proceeding.

In *Davis v. State*, 65 So.2d 307, the Supreme Court said: "... The magistrate conducting a preliminary hearing must be an officer not empowered to try and determine the offense." (§902.01, F.S.A. . . .)

I do not think that the Supreme Court's said statement in the *Davis* case operated to overrule its above-quoted pronouncement in the *Sirmans* case.

Said statement in the *Davis* case was not apropos of any question involved in that case. It was pure obiter dictum since *Davis*' preliminary hearing was not conducted by a magistrate empowered to try and determine the offense with which he was charged. (The offense was breaking and entering and the preliminary hearing was conducted by the county judge, who was not empowered to try and determine it. That power was vested in the judge of the Criminal Court of Record, in which court *Davis* was convicted.) Further, in the *Davis* case, the Supreme Court did not take into consideration, or even mention, its decision in the *Sirmans* case that circuit judges, AS conservators of the peace, are vested with the power and authority of committing magistrates. [All judicial officers are still conservators of the peace. (§25, Art. V, State Const.)]

Hence, my conclusion that the ruling in the *Sirmans* case was not disturbed by said statement in the *Davis* case.

In *Bazarte v. State*, 117 So.2d 227, the Dist. Ct. of App. for the Second Dist. set out with approval the above-quoted obiter dictum pronouncement of the Supreme Court in the *Davis* case, but did not take into consideration, or even mention, the Supreme Court's *Sirmans* decision.

Since our Constitution still makes circuit judges, as well as all other judicial officers, conservators of the peace, and since under the *Sirmans* case circuit judges, AS conservators of the peace, are vested with the power and authority of committing magistrates, and since I do not think that it can rightly be said that the authority of the *Sirmans* case has been impugned by later decisions, it is my opinion that §902.01, F. S., is ineffectual to limit the power and authority of circuit judges to act as committing magistrates in criminal cases, including those which they are empowered to try and determine; and that question 1 is properly answered in the negative.

AS TO QUESTION 2:

This question involves §909.04, F. S., which reads as follows:

909.04 Arrest on *capias* based on indictment or information; habeas corpus; motion to quash; preliminary hearing.—*When an indictment or information is filed and a defendant is in custody under a *capias* he may apply for a writ of habeas corpus, attacking said indictment or information; or he may move to quash the indictment or information and bring it on to be heard before the trial court having jurisdiction. If a defendant so in custody upon a *capias* as aforesaid is confined in jail for thirty days after his arrest, without trial, he may apply to the trial court having jurisdiction for and be allowed a preliminary hearing.* (Emphasis supplied.)

I note that §909.04, F. S., provides that when a person meets its requirements, he may apply to the trial court having jurisdiction for and be allowed a preliminary hearing. I construe this to mean that under the prescribed circumstances, a defendant may apply for and may be allowed a preliminary hearing, and of course the word "may" is ordinarily permissive rather than mandatory. But even if this provision should be construed to mean that the court "shall" allow a preliminary hearing in such a situation, I observe that in *Simmons v. State*, 36 So.2d 207, the Supreme Court of Florida reiterated its approval of the doctrine that: "The word 'shall' when used by the Legislature to prescribe the action of a court is usually a grant of authority, and means 'may.' . . ."

In *Mitchell v. Duncan*, 7 Fla. 13, the Supreme Court said: ". . . Where a statute directs the doing of a thing for the sake of justice, the word *may* means the same as *shall*. . . ." (Emphasis by court.) I think that where a defendant has already had one preliminary hearing, he is not entitled to another one "for the sake of justice."

The Supreme Court said in *Baugus v. State*, 141 So.2d 264, that a preliminary hearing: ". . . [S]erves only to determine whether or not probable cause exists to hold a person for trial. . . ." and it seems to me that that purpose is fully served when a defendant is given one preliminary hearing.

And I note the following cogent observations by the District Court of Appeal for the Third District in *Evans v. State*, 197 So.2d 323, in disposing of the appellant's claim that she had an absolute right to a preliminary hearing under §909.04, F. S., to wit:

A further contention of the appellant was that reversible error was committed by the court by denying her motion for preliminary hearing, made when she was incarcerated for more than 30 days awaiting trial, after arrest on the information. In support thereof appellant relies on §909.04 Fla. Stat., F.S.A., which provides that in such circumstances a defendant "may apply to the trial court having jurisdiction for and be allowed a preliminary hearing."

The appellant concedes that a preliminary hearing is not a critical stage of the proceeding, citing *Baugus v. State*, Fla. 1962, 141 So.2d 264, in which the Supreme Court said (at p. 267): "[T]he procedure of hearing a case preliminarily is not a step in due process of law, is not a prerequisite to a criminal prosecution for the filing of an indictment. It serves only to determine whether or not probable cause exists to hold a person for trial, . . . and a prosecution may be instituted

and maintained regardless of such an investigation."

While the appellant does not contend that the denial of her motion for preliminary hearing prejudiced her case at trial or otherwise, she insists that her right to a preliminary hearing was absolute under the statute, and that the refusal of the court to grant it should cause reversal without need to show a prejudicial result. We can not subscribe to that view. No harmful error was shown. The trial was entitled to proceed notwithstanding the absence of preliminary hearing. *Baugus v. State*, supra.

Consequently, it is my opinion that question 2 is properly answered in the negative.

AS TO QUESTION 3:

In the light of the foregoing comments and authorities, I think that this question should generally be answered in the negative, except, however, that in the unlikely event that a defendant should show that he would be prejudiced by a refusal to give him a preliminary hearing, then, of course, he would have the right to such a hearing.

067-30—June 19, 1967

CRIMES

DOG AND HORSE RACING—OFF-TRACK BETTING

To: Alan R. Williams, County Prosecuting Attorney, Clearwater

QUESTION:

Does §550.23, F. S., negate §849.25, F. S., and authorize off-track betting on dog races and horse races?

Section 849.25, F. S., forbids the taking or receiving of off-track bets on horse and dog races. Section 550.23, F. S., provides:

550.23 Application of laws inconsistent with this chapter.—

All laws and parts of laws inconsistent with any of the provisions of this chapter are expressly declared not to apply to any person participating or engaged in racing or making or contributing to pools thereon *as authorized by and conducted under this chapter*. (Emphasis supplied.)

There is no provision in Ch. 550, F. S., which even purports to negate the effect of §849.25, F. S. I find no provision in the chapter which authorizes betting of any kind except §550.16, F. S., the pertinent part of which provides in part that:

... The sale of tickets or other evidences showing an interest in or a contribution to a *pari-mutuel pool* is hereby permitted *within the enclosure of any horse race track and dog race track licensed and conducted under this law, but not elsewhere in this state except as is provided in chapter 551.* ... (Emphasis supplied.)

It will be noted that the only betting authorized by the quoted portion of §550.16 is *pari-mutuel betting within the enclosure of a horse or dog race track licensed and conducted under Ch. 550, F. S.*, but not elsewhere except as provided in the horse and dog racing law. I note that said quoted portion of §550.16 uses the words "except as is provided in chapter 551." I find nothing in Ch. 551, F. S., which authorizes any type of betting except that §551.09, F. S., authorizes betting on jai alai games within the enclosure of the fronton.

Section 550.23, F. S., does not negate §849.25 and affords no comfort to the off-track bookmaker. Another reason why §550.23 could not possibly have any effect on §849.25 is that what is now §550.23 was enacted in 1931, twenty years prior to the enactment of §849.25 in 1951. I find no conflict between the two sections but even if there were a conflict, §849.25 would control because the last word of the legislature on a subject governs to the exclusion of anything which it has previously said to the contrary.

067-31—June 20, 1967

EMINENT DOMAIN

TAKING PROPERTY OF A PUBLIC UTILITY—COMPENSATION

To: *Ralph E. Elliott, Jr., Attorney, State Canal Authority, Jacksonville*

QUESTIONS:

1. Is a public utility, engaged in supplying electrical service entitled to reimbursement from state funds for removal or abandonment of distribution facilities within the right-of-way being acquired by the Canal Authority for the construction of the Cross Florida Barge Canal?

2. Is the entitlement to reimbursement dependent upon the existence of a property right in the public utility such as a written easement, and does the manner in which the easement was acquired, i. e., by gift, purchase or condemnation affect the entitlement to be reimbursed?

I gather from your request of May 16, 1967, that the Canal Authority of the State of Florida, in constructing its Cross State Canal, and its locks and water storage areas in connection therewith, will flood the rights-of-way and utility lines of some public utility companies, to such an extent as may require the relocation of such utility lines, or the raising of the height of such lines so as to bring them sufficiently above the danger area occasioned by the existence of such power or utility lines. Generally, one public utility may obtain rights-of-way over or on the right-of-way of another public utility when space will permit. (26 Am. Jur. 860, *et seq.*, §§181, *et seq.*; 29A C.J.S. 326, *et seq.*, §§74 *et seq.*). It, therefore, appears that the said Canal Authority may obtain, through eminent domain, a right-of-way for its canal, locks and water storage areas through and over the rights-of-way of other public utilities. It is clear from a reading of Ch. 374, F. S., that the Canal Authority of Florida is duly authorized to acquire and furnish a right-of-way, including rights-of-way for its canal, locks and water storage areas, for the construction of the cross state canal.

Section 374.051, F. S., provides that the Canal Authority of Florida: ". . . [I]s hereby granted the right, privilege, franchise, power and authority to acquire, own, construct, operate and maintain a canal across the peninsula of Florida, connecting the waters of the Atlantic ocean with the waters of the Gulf of Mexico. . . ."

It is further provided in §374.071, F. S., that the Canal Authority is:

. . . [A]uthorized and empowered to acquire by condemnation, rights of way of such lengths and widths as may be reasonably necessary for the proper construction and efficient operation, repair and improvement of said canal and canal system, its embankments, locks and appurtenances

The said Canal Authority of Florida is liable to the public utility whose rights and property may be taken by eminent domain for the just compensation of its property so taken (§12, DR, State Const.). Properties taken by the Canal Authority for the purposes of constructing the cross state canal are within the purview of §12, DR, State Const., and compensation must be made for them. For the purpose of raising funds to assist in the construction of the said canal, and to procure rights-of-way for such construction, the legislature in 1961, created and established the Cross Florida Navigation District, the purpose of which was to raise funds to be used by the Authority in paying for the cost of securing a right-of-way for the cross state canal. This district is a local taxing district, which funds appear to be subject to §374.83, F. S., which section provides that:

... The board of conservation is authorized to equally match out of state funds any moneys or funds raised by any special taxing district now in existence or hereafter created as herein provided for the purchase or acquisition of rights of way for any waterway development project authorized by the state or federal government or appropriate agency thereof.

This statutory provision provides funds for the purchase or acquisition of rights-of-way. Such funds are comprised of matching state and district funds, not state funds alone.

The taxes levied under §374.501, F. S., appear to be levied for the purposes of §§374.301-374.521, F. S., and are, by the terms of §374.501, F. S., limited in their use to administration and operating expenses, and the payment of bonded indebtedness. When these provisions are read and construed with the statutory provisions mentioned in the hereinabove portions of this letter, I seem to reach the conclusion that state funds, as such, may not be used for the purposes mentioned in question 1. If such funds may be used at all for the purposes mentioned in question 1, they must be used as combined state and district matching funds under §374.83, F. S.

To be payable with matching funds under §374.83, F. S., the obligations mentioned in both questions 1 and 2, for the "removal or abandonment of distribution facilities within the right of way being acquired by the Canal Authority for construction of the Cross Florida Barge Canal," such properties must be "right of way properties" under said §374.83, F. S., or "property taken" by the canal authority within the purview and intention of §12, DR, State Const. In 29A C.J.S. 429, §105(1), it is stated that:

Except where there has been an agreement to the contrary, a utility company which has acquired an easement or similar interest for its facilities or lines, as in or abutting a public way, is entitled to compensation where it is required, in connection with the exercise of eminent domain, to remove or relocate its equipment, but where the use of the property or public way by a utility company in this manner is not regarded as being by virtue of an easement or other interest in the land, it is not entitled to compensation for being required to remove or relocate its equipment.

The Third District Court of Appeal of Florida in *North Dade Water Company v. Florida State Turnpike Authority, Fla., App., 114 So.2d 458, text 460*, said that:

Private parties cannot create a franchise. A franchise, in order to constitute a property right in the constitutional sense,

must have been granted by the sovereign or its delegated agents. A contract giving one public service corporation the exclusive privilege of maintaining its works upon a certain tract of land creates no property right that the law will recognize when enforcing the exercise of eminent domain over the same land in behalf of another corporation . . . (2 Nichols, Eminent Domain, §5.75 [4] (3 Ed. 1950)). ". . . It is settled that the incidental frustration of the performance of a contract by the public taking of certain other property is not compensable. . . . An easement is in gross and personal to the holder when it is not appurtenant to other land or premises. An easement is appurtenant when the right which it represents is attached to and belongs with some greater or superior right as a dominant estate. . . . The able trial judge was eminently correct in holding that the easements were unsupported by a dominant estate and were in gross and personal to the holder. . . ."

It is stated in 29A C.J.S. 613, §143, that:

The value of the right to which the lessee is to be deprived on the taking of a leasehold interest constitutes a proper measure of the compensation to be paid, and this is usually the difference between the rental value of the unexpired term and the rent reserved in the lease.

This seems to pose the question of the value of a lease having no terminal date, and rights-of-way for utility poles carrying telephone and other utility lines across the lands of the user of the utility, to his house, place of business, etc.

The entitlement of the owner, whose property is taken by the canal authority, to compensation is the fair market value of the properties taken, without regard to the manner in which they were acquired, the requirement for damages being the taking of a property interest of measurable value. Where the right to property or its use is of uncertain duration, damages extending beyond the date of taking might be questionable. Where there is no written lease for the use of the property, over which a utility line extends, the question of the period of time for which damages may be allowed would become material, and §725.01, F. S., may become material.

The exercise of the right (of eminent domain) is, in effect, or in the nature of, a compulsory sale of the owner's interest in the property sought to be appropriated, and the owner's consent is not required, and his objections are of no avail. (29A C.J.S. 168, §2.)

This being true, it would appear that unless the lessee has an interest in the property protected by the contract clauses of the state and federal constitutions, his rights will be terminated in their entirety upon the taking of the property.

These observations lead to the conclusion that the entitlement to reimbursement is dependent upon the existence of an enforceable property right in the property taken, within §725.01, F. S., or other applicable law. However, the manner in which the easement was acquired, that is, by gift, purchase or condemnation, would not seem to affect the entitlement to be reimbursed.

067-32—June 20, 1967

LEGISLATURE
CALLING EXTRA SESSIONS DURING SPECIAL OR
EXTENDED SESSIONS

To: John E. Mathews, Jr., State Senate, Tallahassee

QUESTIONS:

1. May the members of the legislature, while in "extended session" under the proviso in §2, Art. III, of the State Const., initiate a poll of its membership in the manner provided in said proviso, and, upon the affirmative vote of three fifths of the members of both houses, convene an "extra session" of the legislature?

2. In the event that question 1 is answered in the affirmative, may such "extra session" be convened on a date following the date of the adjournment of an "extended session?"

The Advisory Opinion, Fla., 88 So.2d 131, involved an extra session of the legislature called under §3, Art. VII, of the State Const., for purposes of apportioning the legislature as required by said §3, Art. VII, which contained a requirement that the governor, whenever the legislature fails to make an apportionment in accordance with the requirements of said section, calls it into extra session, requiring that such extra session continue in session until a proper apportionment be made. The extra session called under said §3, Art. VII, of the State Const., remained in session for several weeks, without accomplishing reapportionment, during which time the need for further legislation became apparent, whereupon the governor sought an Advisory Opinion of the Justices as to his right, notwithstanding the session called under said §3, Art. VII, to call an extra session under §8, Art. IV, of the State Const., for the consideration of needed emergency legislation.

The Justices advised that:

If a recess of an extraordinary session called under Section 3, Article VII, of the Constitution could preclude a call for a special session under Section 8, Article IV, it is obvious that both the Governor and the Legislature would thereby be incapacitated to deal with a public emergency requiring legislative action, should one arise during such recess. Obviously such a result was not intended by the framers of the constitution and the people who approved it.

This argument would be applicable here should the need for an extra session under §2, Art. III, of the State Const., arise. An extraordinary session of the legislature may be called by the members of the legislature under §2, Art. III, of the State Const., under like circumstances as would justify the governor calling one under §8, Art. IV, of the said constitution.

These authorities appear to answer question 1 in the affirmative. It also appears that an extra session of the legislature might, notwithstanding said extended session, if conditions require, be called under §8, Art. IV, of the State Const., if the need therefor be great. If an extra session might be called by the governor under §8, Art. IV, I see no reason why a call under the self-starter provisions of §2, Art. III, may not also be put in motion, to convene any time after the adjournment of the extended session.

Question 2 is also answered in the affirmative. Due to considerable authority that the law deals primarily in whole days, not parts of days (86 C.J.S. 900, §16), it would seem advisable that an extra session not be convened on the same day the extended session adjourns, although the call may be completed prior to such adjournment.

067-33—June 20, 1967

LEGISLATION

CONSTRUCTION OF §28, ART. III, STATE CONST.— COMPUTATION OF 5-DAY PERIOD WHEN LEGISLATURE IS IN RECESS

To: Claude R. Kirk, Jr., Governor, Tallahassee

QUESTION:

In computing the 5-day period allowed for approval or disapproval of a bill by the governor under §28, Art. III, State Const., are Saturdays and other days when the legislature is in recess included in or excluded from the computation of said 5-day period?

Section 28, Art. III, of the State Const., provides the procedures to be followed in handling a bill that has been enacted by the legislature after it has been certified to the governor as a bill ready for his action thereon. The governor may approve the bill, in which case it becomes law, effective as provided by law. The governor may take no action on the bill, permitting it to become law effective as provided by law. The governor may veto the bill, in which case it does not become law unless the veto is overridden by the legislature.

Here, we are primarily concerned with the time within which the governor may take action should he elect to veto a bill.

Section 28, Art. III, State Const., provides in part:

... If any bill shall not be returned within five days after it shall have been presented to the Governor, (Sunday excepted) the same shall be a law, in like manner as if he had signed it. If the Legislature, by its final adjournment prevent such action, such bill shall be a law, unless the Governor within twenty (20) days after the adjournment, shall file such bill, with his objections thereto, in the office of the Secretary of State, who shall lay the same before the Legislature at its next session, and if the same shall receive two-thirds of the votes present it shall become a law. (Emphasis supplied.)

In computing the 5-day period allowed for approval or disapproval of a bill by the governor under §28, Art. III, of the State Const., Saturdays and other days when the legislature is in temporary recess are included in the computation of the said 5-day period.

067-34—June 20, 1967

LEGISLATURE

EXTENDED SESSIONS—RECESSES—CALCULATION OF TIME—
CONSTRUCTION OF §2, ART. III, STATE CONST.*To: John E. Mathews, Jr., State Senate, Tallahassee*

QUESTION:

During an extended session of the legislature called pursuant to §2, Art. III, State Const., if the legislature, by joint action of both houses, recesses for a period of more than 24 hours, will such period of time be counted as one (or several) of the 30 legislative days provided under said section?

Section 2, Art. III, of the State Const. provides in part:

... The regular sixty day biennial session of the legislature may, by a three-fifths vote of the membership of both houses, be extended not exceeding a total of thirty days which need not be consecutive. Recesses in such extended session shall be taken only by joint action of both houses. No *extended session* may last beyond September 1st following the regular biennial session. . . . (Emphasis supplied.)

I note the provision that the legislature "may be extended not exceeding thirty days which need not be consecutive" and that such extended session "may not last beyond September 1st following the regular biennial session." The purpose of the above-mentioned constitutional provision is to authorize the members of the Florida Legislature, by complying with said §2, to add up to 30 additional days to a regular session of the legislature, which days need not be consecutive.

In order for the legislature to operate on a nonconsecutive basis, for the 30 days mentioned in the constitution, it is necessary that it take recesses for fixed periods of time, which recesses "shall be taken only by joint action of both houses." This is the method provided by the state constitution for obtaining free or recess days without having to count the said 30 days consecutively, the method for preserving legislative days during recess periods. Recess days are not to be counted as legislative days, but as nonlegislative days, for purposes of calculating the 30-day extension of the legislature. Legislative days may be referred to as the working days of the legislature for purpose of taking up, considering and voting on legislation.

Your question is answered in the negative.

067-35—June 29, 1967

STATE OFFICERS

PROHIBITION AGAINST HOLDING MORE THAN ONE STATE
OFFICE AT THE SAME TIME—CONSTRUCTION OF §15,
ART. XVI, STATE CONST.*To: Claude R. Kirk, Jr., Governor, Tallahassee*

QUESTION:

Is the acceptance by a retired supreme court justice of an appointment as a member of the governing board of a flood control tax district in violation of §15, Art. XVI of the State Const.?

The answer to your question turns upon whether Justice Adams is in fact an officer of the state within the meaning of §15, Art. XVI, State Const., prohibiting any person from holding or performing the functions of more than one office under the government of the state at the same time.

Your letter refers to Justice Adams' status as that of a retired supreme court justice, but our research discloses that he resigned his judicial office.

Our investigation of this matter reveals that Justice Adams resigned his judicial office on Oct. 22, 1951; that he has not since held, and does not at present hold, any other office under the government of the state; that he has not at any time been recalled to judicial service on the supreme court; that he has not been assigned to temporary judicial service on any other court; that he has not been paid, nor has he received, any pension or retirement benefits or compensation whatever from the state judicial system; that he is over 60 years of age; and that if he has not elected to receive from the state a refund of all contributions heretofore made by him to the judicial retirement trust fund, he is presently entitled to be paid the pension or retirement benefits provided by law, provided that he has paid into the judicial retirement fund sufficient contributions as required by law to qualify for such pension benefits.

In the above circumstances, were it not for the enactment of Ch. 63-33, Laws of Florida, §25.072, F. S., during the 1963 Session of the Legislature, Justice Adams unquestionably would be eligible for appointment to the governing board of the flood control district, if otherwise qualified, and would not be disqualified from holding or performing the functions of such office or position under the applicable constitutional provisions.

Chapter 63-33, Laws of Florida, was enacted some twelve years after Justice Adams' resignation from judicial office. The act was filed in the office of the secretary of state on May 10, 1963. This statute purports to make any former justice of the supreme court who was "separated" from judicial service after 1950, and who had theretofore served as a circuit judge and as a justice of the supreme court for an aggregate period of 10 or more years, a "retired" judicial officer, notwithstanding the "form of his separation documents," for the sole purpose of being assigned to temporary judicial service subject to his consent and the approval of the chief justice of the supreme court. Such consent was required to be filed within 1 year after May 10, 1963. We are informed that Justice Adams did correspond with the then chief justice of the supreme court under date of Sept. 13, 1963, stating that he had received a copy of the 1963 Act, which he deemed to apply to him, and advising the chief justice that if the court felt it to be in order, he would be available for service at any time that he might be needed. As previously mentioned, there is no record that Justice Adams has ever been assigned to temporary judicial service since the date of his resignation. Apparently, this letter was merely filed in the files of the then chief justice of the court, no action was taken on the same, and there never has been a sufficient fusion of consent and approval of the chief justice so as to activate or implement the statute or its attempted objective and purpose.

Although I question the effectiveness of Ch. 63-33 to convert a resigned justice, or an individual citizen if you will, into a judicial officer through the medium of legislative declaration or definition, especially when made over 12 years after the resignation in fact from office, I do not feel that it is necessary, or that I am called upon, to

pass upon the validity or invalidity of this statute or its effectiveness to create or to fill an office under the government of this state, and consequently I express no opinion thereon. In passing, I might observe that state officers must be appointed by the governor or elected, and neither the legislative nor the judicial branch of government may appoint a state officer. As you know, the supreme appointive power rests with the governor, and it is doubtful that the legislature or the judiciary, acting singly or in concert, through the alchemy of legislative definition or fiat and judicial approval, may resurrect a resigned officer or transform a common citizen into a public official endowed with a portion of the supreme political authority, or sovereignty.

Inasmuch as the constitution does not clothe resigned justices or judges with a "retired" status under which they may return to active duty or service and there are no constitutional restrictions whatever on the prerogative of a "resigned" justice or judge, I am of the opinion that even if Justice Adams should commence drawing or receiving pension or retirement benefits that he may be entitled to or eligible for under existing law he may, nevertheless, serve upon the governing body of the flood control district. Under §378.15(3), F. S., the chairman and members of the governing board of this flood control district do not receive any compensation for their services. He would not, therefore, be receiving compensation from two state agencies simultaneously in conflict with §282.051, F. S. I do not feel that §18, Art. V, State Const., has any application to such a situation.

In summation, I have concluded that former Justice Adams may be validly appointed and commissioned to serve on the governing body of the Central and Southern Florida Flood Control District and, if otherwise qualified under the law to so serve, he is not in any way disqualified from holding or performing the functions of such office or position under and within the meaning of applicable constitutional provisions. His acceptance of such office will not affect his eligibility for any pension benefits that he may be entitled to and qualified for under existing law.

067-36—July 6, 1967

COUNTY SCHOOL SUPERINTENDENTS

EFFECT OF RATIFICATION OF §6A, ART. VIII, STATE CONST., ON TERMS OF OFFICE OF SUPERINTENDENTS APPOINTED BY GOVERNOR

To: *Floyd T. Christian, State Superintendent of Public Instruction,
Tallahassee*

STATEMENT OF FACTS:

A county school superintendent was appointed by the governor and commissioned on Aug. 1, 1966, to serve during the time of suspension of an elected county school superintendent who was subsequently convicted on Nov. 8, 1966. The electors of that county voted to make the office of county superintendent an appointive office and also on Nov. 8, 1966, the electors of the state ratified Senate Joint Resolution 221 which became §6A of Art. VIII of the State Const. In light of this statement of fact the following questions are posed:

QUESTIONS:

1. Is the county superintendent appointed by the governor entitled to serve out the remainder of the term of office to which the prior officeholder was elected?

2. If the person appointed by the governor is not entitled to serve out the remainder of the term of the duly elected official, for what period of time may he serve on the basis of the said appointment and who then has authority to fill the office?

Section 6A, Art. VIII of the State Const. was approved at the general election on Nov. 8, 1966, to take effect Nov. 9, 1966, and reads as follows:

... In those counties authorized to appoint a superintendent of public instruction under Article XII of the state constitution the superintendent shall serve at the pleasure of the board provided that the board may enter into a contract of employment with such appointed county superintendent which contract shall not extend beyond the thirtieth day of June in the year in which the terms of a majority of the members of the board of public instruction shall expire. The county superintendent shall not be commissioned by the governor but shall be required to file with the county board of public instruction a good and sufficient bond and in such sum and upon such condition as the legislature by law shall prescribe for elective superintendents as provided by Section 7, Article VIII of the state constitution.

In answer to question 1 it is my opinion that the adoption of said §6A had the effect in those counties where the superintendent of public instruction was presently serving under an appointment of the governor of nullifying the governor's commission and as of Nov. 9, 1966, placing the service of such superintendent at the pleasure of the board.

Question 1 is therefore answered in the negative.

In answer to question 2, as of Nov. 9, 1966, under the facts stated above, the appointed county superintendent would be serving at the pleasure of the county school board under the terms and conditions as set forth in §6A, Art. VIII of the State Const. as quoted above.

067-37—July 6, 1967

COUNTY PRISONERS

DISCHARGE FEES AUTHORIZED BY §951.04, F. S.—WHEN PAYABLE

To: *Dean Tooker, County Attorney, Stuart*

QUESTION:

Does §951.04, F. S., require that the discharge fees therein mentioned be paid to county convicts who have served their sentences in the county jail and have not been worked at labor upon the roads, bridges or other public works of the county?

Section 951.04, F. S., reads as follows:

951.04 Duty of county commissioners upon discharge of prisoner.—When a prisoner is discharged by reasons of having served his sentence, or upon receiving a pardon or parole, he shall be furnished transportation, or its equivalent in money, back to the place from which he was sentenced, together with the sum of five dollars, where the sentence is for four months

or more, and the sum of three dollars where the sentence is for a less period than four months, in addition to his transportation, all of which shall be paid out of the general fund of the county in which he was convicted, and for the purpose of carrying out the provisions of this chapter, the clerk of the board of county commissioners of each county shall, under the directions of said board, issue a check on said fund with which to pay these amounts to the prisoners being discharged at the time of their release.

On the face of this statute, standing alone, it would appear to require the payment of a discharge fee to every county prisoner who is discharged by reason of having served his sentence or having received a pardon or parole, without regard to whether he has been put to labor or not. However, as was said by one of my predecessors in office, the Hon. Fred H. Davis, in an opinion found in the 1929-1930 Biennial Report of the Attorney General, p. 308:

The provision of law requiring the county to pay to discharged convicts the sum of \$5.00 where the sentence is for four months or more, and the sum of \$3.00 where the sentence is for less than four months in addition to transportation is a part of the law relating to putting convicts to labor under direction of the Board of County Commissioners. . . . Consequently, the law has no application whatsoever to persons who serve a sentence in jail in the county without ever having been put to labor by the County Commissioners under the terms of the Act. . . . I am therefore of the opinion that there is no obligation on the county to pay these discharge fees to any convict who has not been put to labor in the manner provided by law.

I agree with said opinion. A study of the history of this statute shows that it has always been intended by the legislature to apply to county convicts who have been put to labor. Sections 951.01-951.04, F. S., were all contained in one section of C.G.L., 1927, viz., §8549, which had been enacted for the purpose of providing for putting county convicts to labor on roads, bridges and other public works of the county. Since the provision for discharge fees was part and parcel of a law having this one purpose, it is my opinion that, despite the generality of its wording when viewed in isolation, it was intended by the legislature to apply only to county convicts who have thus been put to labor. Therefore, your question is answered in the negative.

067-38—July 7, 1967

TAXATION

PROPERTY EXEMPT WHEN USED FOR EDUCATIONAL PURPOSE—OCEAN-FRONT COTTAGES OWNED BY ROLLINS COLLEGE

To: *Fred O. Dickinson, Jr., State Comptroller, Tallahassee*

QUESTION:

Are ocean-front cottages owned by Rollins College and used by students as a part of the school recreational program entitled to tax exemption?

Attached to your letter is an affidavit signed by John Tiedtke, Vice-president and Treasurer of Rollins College. Paragraph No. 5 of said affidavit states:

Said Volusia County property is used as a regularly scheduled part of the Rollins program being primarily used as a part of the recreational program for students during the school year;

Paragraph No. 7 of said affidavit states:

Students while on said property are supervised at all times by Mr. and Mrs. Harley Tisdale; drinking is not permitted and discipline is maintained; the rules of the College apply on said property;

Paragraph No. 9 of said affidavit states: "All the aforesaid property is actually occupied and used exclusively for educational purposes by Rollins College."

The criterion for determining whether or not property is to be entitled to a tax exemption for educational purposes is the use to which the property is put rather than the ownership alone of the property.

Said affidavit states that the aforesaid property is actually occupied and used exclusively for educational purposes by Rollins College. Based on this affidavit it appears that the property referred to in your letter would meet the criterion of use so as to be properly classified as being for educational purposes and thus entitled to tax exemption.

However, should the Tax Assessor of Volusia County ascertain upon investigation that this property is not used in connection with or as a part of the educational program of Rollins College, but is instead used solely for recreational as distinguished from educational purposes, then the tax exemption would not apply.

067-39—July 7, 1967

LEGISLATIVE REFERENCE BUREAU

CONFIDENTIALITY OF IDENTITY OF LEGISLATOR MAKING REQUEST TO BUREAU RELATIVE TO A STATUTORY STATE AGENCY

To: *Louis Wolfson, II, Chairman, Florida Legislative Council, Tallahassee*

QUESTION:

May the Director of the Legislative Reference Bureau be required by a state agency or department to divulge the name of a legislator making a request for information from the agency or department through the director of the bureau?

It is necessary first to determine whether the legislative intent has been clearly expressed as to this question. It is apparent from a cursory reading of the statutes cited in your letter that it has. Section 11.23(1), F. S., is a clear command that each state department provide all information requested by the legislature through the legislative reference bureau. Section 11.26(1)(a), F. S., just as clearly forbids the director or any employee of the bureau to "[r]eveal to any person outside of the bureau or [legislative] council the contents or nature of any request for services made by any member of the legislative council, except with the written consent of the person making such request. . . ." Construed in *pari materia*, these sections certainly authorize the director of the legislative reference bureau to request information of state agencies without revealing the name of the legislator who initiated the request. Moreover, there is no basis for construing

them as permitting the requested agency to impose any condition to its compliance with the request.

There also seems to be no basis for concluding that such a statutory agency can appeal to any higher law from this clear statement of legislative intent. The state constitution is a limitation, not a grant, of legislative authority. *Pinellas County v. Laumer*, Fla. 1957, 94 So.2d 837. Therefore, in the absence of constitutional limitations, either expressed or implied, the legislature must be understood as possessing plenary power to legislate in areas falling within its competence. It would seem to follow from this, that a state agency or department that is itself a creature of legislative power could claim no inherent immunity from legislative authority and no inherent right to condition its compliance with a statutory mandate in the manner indicated. See *Trenton v. New Jersey*, 1923, 262 U.S. 182.

I conclude, therefore, that the question posed is answered in the negative.

067-40—July 10, 1967

LEGISLATION

DESIGNATION OF MEMBERS OF TAXING DISTRICTS BY LEGISLATURE

To: *Claude R. Kirk, Jr., Governor, Tallahassee*

QUESTION:

Does the legislature have the right to name the two additional members to the St. Augustine Airport Authority, provided for in and by Ch. 67-1983, Laws of Florida, that is, Robert E. Curtan and James Napier, to serve for terms to expire on "the first Tuesday after the first Monday in January, 1971?"

This question is posed by reason of §27, Art. III, State Const., which provides:

... The Legislature shall provide for the election by the people or appointment by the Governor of all *State and county officers* not otherwise provided for by this Constitution, and fix by law their duties and compensation. (Emphasis supplied.)

This constitutional provision poses the question of whether or not the members of the St. Augustine Airport Authority (established by Ch. 63-1853, Laws of Florida, which was amended by Ch. 65-2172, Laws of Florida) are state or county officers, or not such officers. If such members be state or county officers then said Ch. 67-1983, insofar as it names the said airport authority officers, is unconstitutional, but if not state or county officers, then such legislative designation may be valid.

Section 2 of Ch. 63-1853, as amended by §1, Ch. 65-2172, Laws of Florida, provides that: "There is also created a special tax district in St. Johns County, which district shall be a body politic and corporate and political subdivision of the state, under the name of 'St. Augustine Airport Authority District.' The St. Augustine Airport Authority shall be the governing body and exercise its powers and jurisdiction within the territory of said district," within the boundaries set out in said chapters. It is also provided in §7, Ch. 63-1853, as amended by §3, Ch. 65-2172, that:

* * * * *

In addition to the powers enumerated above, the authority shall for general purposes have the authority to levy an ad valorem tax on all real and tangible personal property including municipal property not actually used for municipal purposes situated within the district, said ad valorem tax not to exceed one (1) mill.

In *State v. Ocean Shore Improvement District*, 116 Fla. 784, 156 So. 433, text 433 and 434, the Sup. Ct. of Fla. remarked that:

A taxing district is not covered by that provision of the Constitution requiring that all officers be elected by the people or appointed by the Governor, consequently the Legislature was at liberty to require the bond trustees or supervisors of such district be designated in other ways . . .

This case was cited with approval in *Advisory Opinion*, 156 Fla. 168, 23 So.2d 158. In *State v. Reardon*, 114 Fla. 755, 154 So. 868, text 871, after referring to §15, Art. XVI, and §27, Art. III, State Const., the court remarked that: "The latter section does not apply to district officers. . . ." In *Town of Palm Beach v. City of West Palm Beach*, Fla., 55 So.2d 566, it was contended that members of the Palm Beaches Sanitary District were required, under §27, Art. III, State Const., to be either elected by the people or appointed by the governor. This the court rejected, stating that: "The officers of this district are neither state nor county officers. They are district officers and it is not necessary that they be elected by the people or appointed by the Governor."

From the authorities cited it appears that members of the St. Augustine Airport Authority are neither state nor county officers, and are, therefore, not within §27, Art. III, State Const.

It appears from *Cobo v. O'Bryant*, Fla., 116 So.2d 233, text 234 and 236, that the legislature, in the absence of some constitutional prohibition, may, in the establishment of a municipality, or its re-establishment, by its enactment specifically name individuals to the governing board to serve until an election is held.

I, therefore, hold that the board members of the St. Augustine Airport Authority are neither state nor county officers within the purview and intention of §27, Art. III, State Const., and not within the purview and intention of said section, and were lawfully selected and appointed by the legislature.

067-41—July 13, 1967

SPECIAL SCHOOL BOND ISSUE

USE OF FUNDS LIMITED TO PURPOSE FOR WHICH BONDS ISSUED

To: *Kenneth Plante, State Senate, Tallahassee*

QUESTION:

Does Special School Tax District No. 1 of Orange County, or the Board of Public Instruction of Orange County for and on behalf of such school tax district, have the power and right to divert or spend approximately \$11,000,000 remaining from a special school bond issue of \$25,000,000 for purposes other than the specific projects and purposes for which the bonds were authorized and issued?

The resolution proposing this particular bond issue provides that to the extent that the actual cost may be greater or less than the

estimated cost of any of the projects particularized in the resolution, such deficiency may be supplied from other funds available therefor, and such surplus may be applied to any other part of such proposed building program. This language seems to constitute a limitation upon the use of the proceeds derived from the issuance and sale of the bonds, and limits the use of the funds to the specific projects and programs set forth in the resolution.

Section 236.41, F. S., is to the effect that if the freeholders approve the issuance of the bonds, the county board shall be authorized and required to issue the bonds authorized by the election for the purposes specified in the resolution as published. The resolution ordering and providing for the election on the question of issuing these bonds sets forth in detail the projects, programs and purposes, and the estimated cost thereof, for the financing of which the proposed bonds were to be issued. The form of the ballot contained in the latter resolution recites that the bonds are to be issued for the purpose of financing the cost of the projects specifically described and provided for in the resolution proposing the bond issue above referred to. The petition for validation of the bonds refers to, and makes a part of or exhibit to the petition, the resolution proposing the bond issue. The final decree validated all of the proceedings had and taken in the authorization of the bonds, including the adoption of resolutions and the election.

Section 236.49, F. S., provides that the proceeds derived from the sale of such bonds shall be held by the county board and shall be expended by the board for the purpose for which the bonds were authorized for the school district, and be held and expended in the manner provided in §236.49, F. S., which among other things, requires that the proceeds arising from the sale of the bonds be deposited in a separate bond construction fund account. This language would appear to constitute such moneys trust funds for the specific purposes specified in the proceedings authorizing the issuance and sale of the bonds. Section 236.50, F. S., does provide that any surplus proceeds of the sale of the bonds may be held and used for the exclusive use of public schools within the school bond district as the county board may deem reasonable and proper, but only should such surplus remain after the purpose and object for which the bonds were issued shall have been carried out and performed by the county board.

It has been held that bonds to be issued or proceeds derived therefrom must be for the purpose for which they are voted, and that although some school officials have limited authority, under certain conditions, to transfer or allocate funds realized from the sale of school bonds from one project to another included within the general purpose for which bonds are authorized, the transfer must be to a project included in the general purpose as stated in the bond resolution and notice of election. Likewise, it has been held that school taxes or revenues raised for a particular school purpose cannot lawfully be applied to any other purpose except as provided otherwise by statute. 79 C.J.S. 107, and 281 *et seq.*

In *Miami Bank and Trust Co. v. Board of Public Instruction for Broward County et al.* (Fla. 1918), 80 So. 307, it was held that funds in the control of a board of public instruction, which were raised by the public for the specific purpose of building a schoolhouse, constitute trust funds for that purpose, and may not be diverted to any other purpose until the purpose for which such funds were raised has been accomplished.

My predecessor in office, Hon. Richard W. Ervin, was confronted with the question as to the disposition to be made of funds derived

from the sale of bonds issued by a special tax school district for several projects, one of which was never built. Viewing this question in the light of the Miami Bank and Trust Co. v. Board of Public Instruction for Broward County, *supra*, he ruled that the funds there in question could only be used to build the original project for which the bonds were issued, or to repurchase the bonds or redeem them, whichever might be possible and most advantageous to the school district. AGO 049-129, p. 292, Biennial Report of the Attorney General 1949-1950. I know of no later statutory or decisional law or opinions of this office bearing on this question which would lead me to recede from AGO 049-129.

Recent practice in instances such as this has been to include appropriate provisions in bond resolutions stipulating that if any of the proceeds derived from the issuance and sale of the bonds are not needed for the specific purposes specified in the bond resolutions, such surplus funds might be used for other authorized school purposes.

Inasmuch as no provision such as the above is contained in the authorizing resolutions accompanying your inquiry, and in the light of prior opinions of this office, your question is answered in the negative.

067-42—July 13, 1967

PUBLIC OFFICERS

COUNTY OFFICER'S RIGHT TO BE REIMBURSED FOR ATTORNEY FEES INCURRED IN DEFENDING TORT ACTION

To: Mack S. Futch, Attorney, Levy County Commissioners, Gainesville

QUESTION:

Is a county officer who is sued in a tort action, in which the trial court directed a verdict in favor of such officer on four of the five counts brought against him, entitled to apportion four fifths of the attorneys' fees incurred by him in defending the suit as an expense of the county?

Apart from statute, public officers are generally liable in private actions for their own torts, and are also answerable for their negligent acts in the performance of their official duties to those who suffer injury by reason thereof. Likewise, whenever a public officer goes outside the scope of his authority or duty, he is not entitled to immunity or protection because of his office, but is liable for his acts like any private individual. In such instances, it would not appear that the employment of an attorney to represent the officer sued is necessary to protect the interests of the county or serves a county purpose or results in a benefit to the county, and the expenditure of county funds in payment of legal services for the benefit of the officer so sued would not be authorized.

I know of no statute or decisional law or prior opinions of this office authorizing the expenditure of county funds for payment of legal expenses, or any part thereof, incurred by a county officer in defending a private action for his own torts or under the limited circumstances set forth in your inquiry, especially where recovery is made on one or more of the charges or counts brought against him.

My predecessor ruled that public officers in the performance of their official duties and while serving a county purpose are entitled to

some assurance that in the performance of a public service they will not be put to the expense of defending a civil action predicated upon their official acts, and that should it be finally determined that they are not civilly liable, the county may properly pay a reasonable attorney's fee incurred in their defense as such services constitute a county purpose, AGO 054-206, Biennial Report of the Attorney General 1953-1954, p. 137. However, the circumstances implicit in your inquiry do not seem to bring the officer involved in the instant question within the purview of the rule announced in the cited opinion.

I recently discussed the question of a public officer's entitlement to attorney fees in a letter to County Judge Miles B. Mank, II, dated May 23, 1967, and a copy thereof is enclosed as the observations made therein may be of some help to you in the instant situation.

In light of the above comments, I entertain grave doubt that any part of the legal expenses incurred by the involved county officer may be apportioned as an expense of the county and paid from county funds. Accordingly, your question is answered in the negative.
067-43—July 13, 1967

COURTS

CRIMINAL COURT OF RECORD—REQUIRED PLACE FOR HOLDING COURT

To: Robert S. Appleton, Judge, Criminal Court of Record, Key West
QUESTION:

Is it proper for the judge of a criminal court of record to sit on nonjury matters at a location other than the county seat?

I am of the opinion that §32.04, F. S., is controlling. The statute reads as follows:

... The terms shall be held in the circuit courtroom of the courthouse of the county, unless the circuit court be in actual session at the time of holding of said criminal court of record. Provided, however, that the board of county commissioners may provide or appoint some other place for the holding of said court, which need not be in the county courthouse.

The proviso in the above statute does not mean that court may be held at a place other than the county seat, but only that court may be held in a room other than the circuit court courtroom or, perhaps, in a building other than the county courthouse if the physical circumstances so require. But this may be done only by action of the board of county commissioners as set forth in the statute.

I do not read §125.222, F. S., as authorizing nonjury trials at a location other than the county seat. The statute only provides for the use of auxiliary county offices for the purposes specified therein. The statute does not say or even intimate that a nonjury trial may be had in such auxiliary county offices located at a place other than the county seat. Your attention is directed to the preceding §125.221 which reads as follows:

125.221 Holding of court and meeting of grand jury; place other than courthouse.—In the event there is not suitable available space in the courthouse due to construction or reconstruction, destruction or other good reasons, for the holding of any court or courts now provided to be held in the county courthouse, or for the meeting of the grand jury of the county,

the county commission, with the approval of the court, may designate some other place or places located in the county seat for the holding of court or courts or for the meeting of the grand jury.

You will note the above statute clearly provides that the county commission with the approval of the court may designate some other place or places located in the county seat for the holding of court.

Your attention is directed to the case of *Mack v. Carter*, 183 So. 478 (1938), wherein the Florida Supreme Court held a local act providing for terms of the circuit court to be held in St. Petersburg in certain civil cases to be unconstitutional. The court reasoned that holding terms of the circuit court is one of the functions for which a county seat is created and insofar as the act provided for terms of court at St. Petersburg for the trial of specific cases, it amounted to a change of the county seat and thus violative of §4, Art. VIII, State Const. I believe the reasoning in *Mack v. Carter*, *supra*, to be equally applicable to the question of holding nonjury trials in a place other than the county seat. In the absence of a constitutional amendment, I do not see how the holding of nonjury trials in a place other than the county seat can be legally justified.

Interestingly enough, it was after the decision of the supreme court was handed down in *Mack v. Carter*, *supra*, that our constitution was amended in 1956 to allow civil jury trials to be held in a municipality other than the county seat. See §§4A-4F Art. XVI, State Const. It is pointed out that no mention is made of criminal trials in the aforementioned constitutional provisions. Reasonably then, if a constitutional amendment is necessary to authorize the holding of civil jury trials in municipalities other than the county seat, it is my considered opinion that the same authorization would be necessary before you would be permitted to preside over nonjury trials in a place other than the county seat.

Accordingly, your inquiry must be answered in the negative.

067-44—July 19, 1967

COUNTY JUDGES' COURTS

PROBATE AND GUARDIANSHIP—FEES FOR ENTRY OF ORDERS WHERE ESTATE IS WITHOUT FUNDS

To: William C. Brooker, County Judge, Tampa

QUESTION:

What procedure is followed and what record is made by county judges in the estate of a decedent, a minor or an incompetent, when the estate is without funds to pay prescribed fees?

Generally, "Public officers have no legal claim for official services rendered, except when, and to the extent that, compensation is provided by law, and when no compensation is so provided, the rendition of such service is deemed to be gratuitous." (*Rawls v. State*, 98 Fla. 103, 122 So. 222, text same; *Brown v. St. Lucie County*, 114 Fla. 789, 153 So. 906, text 907; *State v. Reardon*, 112 Fla. 755, 154 So. 868, text 871; *Gavagan v. Marshall*, 160 Fla. 154, 33 So.2d 862, text 864.) From these cases it appears that public officers may be required to perform official duties whether or not compensation be provided therefor. In the light of these observations it seems that a county judge, when he

deems it necessary for the administration of estates of decedents, minors and incompetents, may make and enter such orders, charging the fees for such services to the estate in which made, to be paid if and when funds are available. Should no funds ever come into such estates from which such fees may be paid, I see no reason why the necessary orders to close the estate may not be made although no funds be available to pay the fees for entering such orders.

Whenever orders or decrees are made without funds for paying the fees therefor, the court should make, or cause to be made, an entry, or notation, in the record of the case evidencing the want of funds to make such payments. The county judges and the state auditor should agree as to the place where such order is to appear in the record of the case, as well as the general form thereof, should they desire.

You make some comment of a county "contingency fund to be available to the county judges for use in their discretion for such purposes, the disbursement thereof to be accounted for to the county." In the first instance, I feel that such a fund to be legal should be provided for by the legislature.

067-45—July 25, 1967

CRIMINAL PROCEDURE

FELONY JUDGMENT REQUIREMENTS—CONSTRUCTION OF WORD "FINGERPRINTS"

To: James G. Horrell, County Solicitor, Orlando

QUESTION:

Would the fingerprint requirement of Ch. 67-214, Laws of Florida, (§921.025, F. S.) be complied with if only the thumbprints of a defendant were used instead of all of his fingerprints?

Sections 1 and 2 of Ch. 67-214 Laws of Florida, (§921.025(1),(2), F. S.) read as follows:

Section 1. Every judgment of guilty or not guilty of a felony shall be in writing, signed by the judge and recorded. The judge shall cause to be affixed to every written judgment of guilty of a felony, in open court and in the presence of such judge, *the fingerprints* of the defendant against whom such judgment is rendered. *Such fingerprints* shall be affixed beneath the judge's signature to such judgment. Beneath such fingerprints shall be appended a certificate to the following effect: "I hereby certify that the above and foregoing fingerprints on this judgment are the fingerprints of the defendant, _____, and that they were placed thereon by said defendant in my presence, in open court, this the ____ day of _____, 19 ____." Such certificate shall be signed by the judge, whose signature thereto shall be followed by the word "Judge." (Emphasis supplied.)

Section 2. Any such written judgment of guilty of a felony, or a certified copy thereof, shall be admissible in evidence in the several courts of this state as prima facie evidence that the fingerprints appearing thereon and certified by the judge as aforesaid are the fingerprints of the defendant against whom such judgment of guilty of a felony was rendered.

It is apparent that the legislative purpose in enacting this statute was to insure that a person adjudged guilty of a felony can be identified at a future time as the person so adjudged guilty. To accomplish this purpose, the legislature provided in the statute that "the fingerprints" of a person adjudged guilty of a felony shall be placed on the written judgment. If all of a person's fingerprints are taken, there are more points of comparison to aid in identification than if only some of them are taken and, since the legislative purpose was to insure identification, I think that the statutory words "the fingerprints" are properly construed to mean all of the convicted person's fingerprints. Therefore, your question is answered in the negative.

067-46—July 28, 1967

RETIREMENT

COMPULSORY RETIREMENT AGE FOR UNIVERSITY PROFESSORS

To: *Rep. Kenneth M. Myers, Chairman, Retirement and Personnel Committee, Tallahassee*

QUESTION:

In the light of §238.07(1), F. S., may a professor continue to teach after his seventieth birthday?

Section 238.07(1), F. S., reads in part as follows:

... Any member who attains seventy years of age shall be retired forthwith; provided, however, that with the approval of his employer he may remain in service until the end of the school year following the date on which he attains seventy years of age. ...

In AGO 050-271, issued by one of my predecessors to the State Superintendent of Public Instruction, it was noted that "... the Legislature has fixed the age for compulsory retirement at seventy years." This opinion was concurred in by another of my predecessors in AGO 064-26.

The above opinions referred to teachers employed by the county school system, but inasmuch as teachers in the university system are covered by the same retirement law as those in the public schools the holdings of the above referenced opinions would be applicable to teachers in the university system.

Your question specifically asks if a professor may continue to teach after his seventieth birthday. You will note from the above-quoted section of the statute that a teacher "may remain in service until the end of the school year following the date on which he attains seventy years of age." It is my interpretation that the words "following the date on which he attains seventy years of age" modify the word "end" and not the words "school year" so that this section should properly be interpreted as meaning that with permission the teacher could complete the school year during which his seventieth birthday fell. I do not believe that the legislature intended to mean that he could be employed until the end of the school year which begins and ends following the date of his seventieth birthday.

067-47—August 3, 1967

FLORIDA EGG COMMISSION

EXPENDITURE OF TAX ON EGGS IMPOSED BY §504.08,
F. S.—ADVERTISING, PUBLICITY, CONSUMER
INFORMATION AND SALES PROMOTION

To: John W. Cripe, Florida Egg Commission, Bradenton

QUESTION:

May the funds derived from the tax on eggs imposed by §504.08, F. S., be used by the Florida Egg Commission, to furnish meals and entertainment as a means of advertising Florida eggs in order to promote increased demands for Florida eggs?

There appears to be a clear distinction between the inspection fees imposed on eggs by §583.07, F. S. (which fees appear to be intended as a fund for use in regulating the classification and sale of eggs in Florida under the regulatory powers and police powers of the state for the protection of the buying public) and the tax on eggs imposed by §504.08, F. S., in the light of §504.07, F. S., and other provisions of said Ch. 504, F. S. Section 504.07 appears to have established a fund designed to be used in advertising and promoting the business of egg production within the state. It is required by §504.07, F. S., that:

. . . The commission shall plan and conduct campaigns for commodity advertising, publicity, consumer information and sales promotion to increase consumption of eggs and may contract for any advertising, publicity, consumer information and sales promotion services. To accomplish such purposes the commission shall have power, and it shall be the duty of the commission to disseminate information:

(1) Relating to eggs and the importance thereof in the diet of the people, in preserving public health, and the economy thereof in the diet, and the importance in the nutrition of children.

(2) Relating to the manner, method and means used and employed in the production and marketing of Florida produced eggs and to the efforts to safeguard such production and marketing.

(3) Relating to the added costs to the producer and dealer or handler in producing and handling eggs of such high standards of quality as to insure a pure and wholesome product for the consuming public.

(4) Relating to the reasons why the producers and dealers or handlers should receive a reasonable return on their labor and investments.

(5) Relating to the problems of furnishing at all times an abundant supply of fine quality eggs at reasonable prices.

(6) Relating to factors that influence consumer purchasing power and price relative to the costs of other items of food in the diet to create a better consumer demand for eggs.

(7) To decide upon some distinctive and suggestive trade name for Florida produced eggs, and promote the use of same in ways to advertise Florida eggs. (Emphasis supplied.)

This statute differs little, if any, from §601.15, F. S., which imposes

an excise tax on citrus fruits for the purpose of conducting an advertising campaign designed to increase the demand, within and without the state for Florida citrus fruits. The advertising tax on citrus fruits appears to have been upheld in *C. V. Floyd Fruit Co. v. Florida Citrus Commission*, 128 Fla. 565, 175 So. 248, text 61 and 62; 112 A.L.R. 562, in which case the Sup. Ct. of Fla. said that it "has repeatedly held that an advertising tax for state, county or municipal purposes may be lawfully imposed." *City of Jacksonville v. Oldham*, 112 Fla. 502, 150 So. 619; *City of DeLand v. Moorehead*, 96 Fla. 737, 119 So. 117; *Earle v. Dade County Commission*, 92 Fla. 432, 109 So. 331. In *Miller v. Ryan*, Fla. 54 So.2d 60, text 61 and 62, which involved the validity of an act of the Florida Legislature, which established an advertising district in Volusia County, for the purpose of advertising the advantages, facilities and products of said district, the court, in upholding the validity of said district, remarked that:

This court has repeatedly held that an advertising tax for state, county or municipal purposes may be lawfully imposed. *City of Jacksonville v. Oldham*, 112 Fla. 502, 150 So. 619; *City of DeLand v. Moorehead*, 96 Fla. 737, 119 So. 117; *Earle v. Dade County*, 92 Fla. 432, 109 So. 331; *C. V. Floyd Fruit Company v. Florida Citrus Commission*, 128 Fla. 565, 175 So. 248; 112 A.L.R. 562; *Stewart v. Thursby*, 103 Fla. 990, 138 So. 742; *State ex rel. Barnett National Bank of DeLand v. Thursby*, 112 Fla. 257, 150 So. 252.

It appears that funds derived from the tax on eggs imposed by §504.08, F. S., may be expended by the Florida Egg Commission in connection with their advertising, publicity, consumer information and sale of eggs produced in the State of Florida. What is to be classified as commodity advertising, publicity, consumer information and sales promotion services appears to be largely a question of fact and not one of law. It would seem to be the duty of the Florida Egg Commission to justify the expenditure of such funds as expenditures for commodity advertising, publicity, consumer information and sales promotion services.

The above-stated question is answered in the affirmative, provided that the primary purpose and effect of such meals and entertainment is to produce commodity advertising, publicity, consumer information and sales promotion, and that such purpose and effect have actually been accomplished.

067-48—August 7, 1967

COURTS

CRIMINAL COURT OF RECORD—CHANGE OF VENUE— ASSIGNMENT OF PROSECUTING ATTORNEY

To: James G. Horrell, County Solicitor, Orlando

STATEMENT OF FACT:

The State Attorney for the Fourth Judicial Circuit, as Prosecuting Attorney for the Criminal Court of Record of Duval County, filed informations against a defendant who applied for and obtained a change of venue to the Criminal Court of Record of Orange County; the charges against said defendant involve highly technical points of law and resulted from the long and intensive investigation by the said State

Attorney, his assistants, and the grand jury. The Orange County Solicitor feels it will be to the best interest of the state that the prosecution of the case be conducted by the State Attorney of the Fourth Judicial Circuit and his assistants.

QUESTIONS:

1. Upon request, and upon a showing of the facts as outlined above, may the Governor of Florida assign said state attorney to prosecute said case in the Criminal Court of Record of Orange County and, if so, should such request be made by the state attorney or by the county solicitor?

2. If the Governor may not make such assignment, may the Judge of the Criminal Court of Record of Orange County, under the facts and showing as above set forth, appoint said state attorney to be county solicitor of Orange County, ad litem, for this particular prosecution?

3. If the Governor may not make such assignment and the judge may not make such appointment, may the County Solicitor of Orange County, under the facts and showing as above set forth, appoint said state attorney and certain of his assistant state attorneys, special assistant county solicitors of Orange County for the purpose of conducting said prosecution?

AS TO QUESTION 1:

I find no statutory authority for the governor to assign the State Attorney of the Fourth Judicial Circuit to prosecute a case in the Criminal Court of Record of Orange County. For that matter, there does not appear to be any statute authorizing the governor to assign the county solicitor for the criminal court of record of one county to prosecute in the criminal court of record of another county.

Nor do I find any constitutional provision which, under the circumstances related by you, would furnish authorization for the governor to assign the State Attorney of the Fourth Judicial Circuit to prosecute said cases in the Criminal Court of Record of Orange County.

It appears that the only authority vested in the governor to assign a prosecuting attorney to prosecute a case in a criminal court of record is that dealt with in Advisory Opinion to the Governor, 10 So.2d 926. There, the County Solicitor of Palm Beach County moved to disqualify himself in certain cases and the motion was granted by the judge of the criminal court of record. Said judge sought unsuccessfully to find an attorney who was competent to try the cases and who was willing to accept an appointment as county solicitor by the judge under the authority of §32.17, F. S. Then the judge laid the facts before the governor, who in turn requested that the supreme court render an advisory opinion. The supreme court advised the governor that there was no provision of law specifically authorizing the assignment of a county solicitor to other counties but that, under the circumstances, and in view of the provision of §6, Art. IV, State Const., that "[t]he Governor shall take care that the laws be faithfully executed." the governor had the power to assign the county solicitor of the criminal court of record of another county to discharge the duties of the County Solicitor of the Criminal Court of Record of Palm Beach County.

Inasmuch as §9A, Art. V, State Const. provides that the State Attorney of the Fourth Judicial Circuit "... shall be the prosecuting

attorney of the Criminal Court of Record of Duval County, Florida . . ." and ". . . shall perform all the duties and functions of office heretofore performed by the County Solicitor." . . . I assume, without deciding, that under such circumstances as were involved in *In Re Advisory Opinion, supra*, he would be just as eligible for assignment by the governor to prosecute in the criminal court of record of some other county. However, no such circumstances appear in the situation outlined by you, since you have not been disqualified and the judge of your criminal court of record has not unsuccessfully attempted to procure competent counsel willing to accept an appointment as county solicitor under §32.17, F. S. Therefore, question 1 is answered in the negative.

AS TO QUESTION 2:

The only authority for the Judge of the Criminal Court of Record of Orange County to appoint a County Solicitor is found in said §32.17, F. S., which reads as follows:

32.17 Appointment of solicitor by the judge.—Whenever there shall be a vacancy in the office of county solicitor in any of the counties of this state in which a criminal court of record is established, either by reason of nonappointment or otherwise, or if a county solicitor shall not be present at any term of the court, or, being present, shall from any cause be unable to perform the duties of his office, the judge of said court shall have full power to appoint a county solicitor from among the members of the bar with the consent of such member so appointed, to whom shall be administered an oath to faithfully discharge the duties of county solicitor, and who shall have as full and complete authority, and whose acts shall be in all respects as valid, as a regularly appointed county solicitor. He shall sign all informations and other papers as acting county solicitor. The power of said appointee shall cease upon the filling of said office by appointment or upon the ability of the county solicitor to perform the duties of his office, a note of which shall be entered upon the minutes of the court. The compensation of such appointee shall be the same as that of the regularly appointed county solicitor, and shall be paid by the regular county solicitor, and not by the county or state, in those cases in which the temporary appointment is made by reason of the absence, inability or disqualification of the regular county solicitor.

It does not appear from your letter that any of the prerequisites specified in said statute exist and for present purposes I shall assume that none of them do exist. The result is that the Judge of your Criminal Court of Record has no authority to appoint an Acting County Solicitor under said statute. Therefore, it is unnecessary for me to consider the question of whether, if one of said prerequisites did exist, said court could appoint the State Attorney of the Fourth Judicial Circuit as Acting County Solicitor of your county.

AS TO QUESTION 3:

Section 27.18, F. S., authorizes a state attorney to procure the assistance of any member of the bar under the circumstances specified therein. I find no comparable statute relating to county solicitors. However, in *Thalheim v. State*, 20 So. 938, 942, the Sup. Ct. of Fla. said:

. . . A public prosecution must be conducted by the *proper*

official representative of the state, and must not under any circumstances be placed under the entire management and control of private parties or their attorneys. It is proper, however, for the state attorney, *when there is no express statutory prohibition*, to obtain, with the consent of the court, the assistance of other counsel; and other members of the bar are not incompetent to be engaged for such assistance, and taking part in the trial, by reason of being retained and compensated by the prosecuting witness, the party injured by the crime, or other private interests. When such assistants are employed in the case, the state attorney should always remain present at the trial, and see that a public prosecution for a criminal offense does not degenerate into a private persecution, and that the administration of the criminal law is not made a vehicle of oppression for the gratification of private malice, or the accomplishment of private gain or advantage. . . . (Emphasis supplied.)

To the same effect, see *Oglesby v. State*, 90 So. 825, 826; *Jerry v. State*, 128 So. 807, 808; *Ates v. State*, 194 So. 286; and *Thomas v. State*, 59 So.2d 517, 519.

A county solicitor is just as much a "proper official representative of the state" as is a state attorney and the principles laid down in the foregoing quotation from the *Thalheim* case are equally applicable to both. Said quotation merely expresses the general rule throughout the country, which applies to "prosecuting attorneys," not merely to state attorneys. (See 42 Am. Jur. 241-243, *Prosecuting Attorneys*, §§10, and 27 C.J.S. 710-711, *District and Prosecuting Attorneys*, §28(2).) There is no express statutory prohibition against a county solicitor availing himself of the assistance of outside attorneys in the prosecution of a case.

Therefore, it is my opinion that you, as county solicitor, have the legal right to call in an attorney or attorneys to assist you in the prosecution of the above-mentioned cases, and that you may make use of the services of the State Attorney of the Fourth Judicial Circuit and his assistants for this purpose. They are in no sense disqualified to render such assistance. I suggest that you procure the consent of the Judge of your Criminal Court of Record to this course of action.

067-49—August 10, 1967

LEGISLATION

EFFECTIVE DATE OF ACT BECOMING LAW AFTER EFFECTIVE DATE SPECIFICALLY PROVIDED IN ACT

To: Don D. Meiklejohn, Director, State Beverage Department,
Tallahassee

QUESTION:

What is the effective date of Ch. 67-313, Laws of Florida
(House Bill No. 1758)?

Chapter 67-313, Laws of Florida (House Bill No. 1758), relates to beverage taxes and levies and imposes additional taxes upon the manufacture, distribution and sale of certain alcoholic beverages, and appropriates from the general revenue fund certain amounts during the 1967-1969 biennium for the alcoholic rehabilitation program.

This bill was introduced in the house of representatives on May 17, 1967, and passed by the house on June 24, 1967. The senate passed the bill on June 26, 1967, and the act was presented to the governor for his approval or disapproval on June 29, 1967. The act became law without the approval of the governor upon the running of the 5-day period specified in §28, Art. III, State Const., and was filed in the office of the secretary of state on July 6, 1967. Section 3 of the act provides that the act "shall take effect July 1, 1967."

The pertinent portions of §28, Art. III, State Const., provide that every bill that may have passed the legislature shall, before becoming a law, be presented to the governor for his approval or disapproval, and that "[i]f any bill shall not be returned within five days after it shall have been presented to the Governor, (Sunday excepted) the same shall be a law, in like manner as if he had signed it."

Section 18, Art. III, State Const., provides that "[n]o law shall take effect until sixty days from the final adjournment of the session of the Legislature at which it may have been enacted, unless otherwise specially provided in such law."

Under §§18 and 28, Art. III, State Const., an act may become a law on one date and become effective on another date. "Becoming a law" and "taking effect" are not the same thing, and a distinction has been observed between the time when a bill becomes a law and when it goes into effect or begins to operate. A statute takes effect on the 60th day after the adjournment of the legislature at which it was enacted, unless another effective date be fixed by the act itself. See AGO 061-91, June 2, 1961; AGO 067-21, May 5, 1967.

House Bill No. 1758 by its express terms provides that the act should take effect on July 1, 1967, but the statute could not and did not become a law until approved by the governor or until the running of the 5-day period prescribed by §28, Art. III, State Const., no veto being here involved, or until July 6, 1967. This appears to raise a question of first impression in Florida, and research has not unearthed in the other jurisdictions any case determining the precise issue here presented, although there are several cases in other states that shed light upon the question. See *In Re Borough of Sharpsburg* (Pa. 1948), 60 A.2d 557; *Portland-Pendleton Motor Transp. Co. v. Heltzel* (Ore. 1953), 255 P.2d 124; *Robey v. Broersma* (Md. 1943), 29 A.2d 827; Anno: 146 A.L.R. 693; also see AGO 067-21, May 5, 1967.

The rationale of the above-cited cases seems to be that the effective date clause of a statute becomes of no effect and void by the circumstance that the act is not approved by the governor before the effective date designated in the act by the legislature; that the provision of the statute fixing its effective date cannot operate for that purpose and is not effective for any purpose, but must be totally disregarded; and that the act must be read as though the effective date clause or provision were not in it. *In Re Borough of Sharpsburg, supra*; *Portland-Pendleton Motor Transp. Co. v. Heltzel, supra*; *Robey v. Broersma, supra*. These principles should apply to a situation, as here, where, by operation of the applicable constitutional provisions, an act does not become law without the governor's approval before the effective date specified in the statute by the legislature.

Although retroactive legislation is not in terms forbidden by the State or Federal Constitutions, it is well-settled that a statute will not be construed as retroactive unless its terms clearly show that such a result was intended. Instead, the presumption is that a legislative act operates prospectively only, unless there is a clear showing of retro-

active intent. See *State ex rel. Bayless v. Lee*, (Fla. 1945), 23 So.2d 575; *Indemnity Ins. Co. v. Brooks-Fisher Insulating Co.* (Fla. App. 1962), 140 So.2d 613; *City of Miami v. Board of Public Instruction* (Fla. 1954), 72 So.2d 901. Acts which create new obligations and impose new penalties have been more rigidly construed as being governed by the foregoing rules, and if a retrospective interpretation has nothing more than implication to support it, it must be unequivocal and leave no room for doubt as to legislative intent. *Larson v. Independent Life and Accident Ins. Co.* (Fla. 1947), 29 So.2d 448.

Generally, taxing statutes should be strictly construed in favor of the taxpayer and against the taxing power. *Heriot v. City of Pensacola* (Fla. 1933), 146 So. 654; *Overstreet v. Ty-Tan, Inc.* (Fla. 1950), 48 So.2d 158. As stated in *Portland-Pendleton Motor Transp. Co. v. Heltzel*, *supra*, where the authority to tax is doubtful, the doubt will be resolved in favor of the taxpayer and against the tax.

In reading the act in question, I find nothing whatever in its terms that would warrant giving it a retroactive effect as to the date the additional beverage taxes imposed by it should go into effect.

The date that an act shall become effective is a part of every law enacted by the legislature. If no date is otherwise specified or written into the act, then the "sixty days" provision or the time prescribed by §18, Art. III, State Const., governs to all intents and purposes as though expressly stated in the act itself. If the statute contained no provision as to its effective date, it would go into effect or operation 60 days after final adjournment of the 1967 Regular Session, as extended, of the Legislature, and the obligation to pay and the liability for the additional taxes levied and imposed by the act would then arise and go into effect.

In the instant case it seems clear that the legislature did not purpose retroactive operation of the statute. It did not seek to accelerate effectiveness by designating a date antecedent to approval of the bill or its becoming law without the approval of the governor. In fixing a future effective date the legislature stamped its prospective character on the face of the act. The future effective date designated by the legislature was not intended to render the statute retrospective, and the insertion of the July 1, 1967, date is no indication that it intended the law to be void if not approved by the governor before July 1 or if it did not become law without the approval of the governor before July 1, 1967. If the legislature otherwise intended, it should and would have specifically so provided. When the legislature passed the act and presented it to the governor it must be presumed to have done so in the knowledge that under the constitutional provisions and court decisions construing them, the governor might not approve or sign the act before the effective date specified in the act and that the act would not become law without the approval of the governor until after the date designated by the statute. It must be presumed that it was within the legislative intent that should this bill be approved after July 1, 1967, its effective date should be determined by §18, Art. III, State Const., under which it would become effective 60 days after the final adjournment of the 1967 Session, as extended, of the Legislature.

No statute has by its own strength or power any force or effect until it becomes (an effective) law as provided for by the terms of §§18 and 28, Art. III, State Const., as construed by the courts, and until the time arrives when it is to take effect and be in force as provided for by organic law, it has no force whatever for any purpose. *Neisel v. Moran* (Fla. 1920), 85 So. 346. Finding, as I do, that the in-

stant statute must be read as though the effective date clause were not in it, I must also find that its effective date is controlled and governed by §18, Art. III, State Const., and that the law will not take effect or become operative until 60 days from the final adjournment of the 1967 extended Regular Session of the Legislature.

In view of the foregoing, it is my opinion that Ch. 67-313 (House Bill No. 1758), Laws of Florida, takes effect 60 days after final adjournment of the 1967 extended Regular Session of the Legislature, or 60 days from July 14, 1967, and that the additional taxes levied and imposed by this law will not go into effect or become operative until Sept. 12, 1967.

067-50—August 10, 1967

UNIFORM NARCOTICS DRUG LAW

NARCOTIC DRUGS—PREPARATIONS KNOWN AS CLASS X AND CLASS M SUBJECT TO CRIMINAL PROVISIONS OF §398.19, F. S.

To: *Wilson T. Sowder, State Health Officer, Jacksonville*

QUESTION:

Does §398.19(6), F. S., make Class X and Class M drugs under §398.09(1), F. S., narcotic drugs subject to the criminal acts set forth in §398.19(1)-(5), F. S.?

Your question is answered in the affirmative.

The answer to your question can best be arrived at by considering the elements in your question in reverse order. The prohibitions contained in §398.19(1)-(5), F. S., provide as follows:

398.19 Fraud in obtaining narcotic drugs.—

(1) No person shall obtain or attempt to obtain a narcotic drug, or obtain or attempt to obtain a prescription for a narcotic drug, or procure or attempt to procure the administration of a narcotic drug:

- (a) By fraud, deceit, misrepresentation, or subterfuge; or
- (b) By the forgery or alteration of a prescription or of any written order; or
- (c) By the concealment of a material fact; or
- (d) By the use of a false name or the giving of a false address.

(2) No person shall willfully make a false statement in any prescription, order, report, or record, required by this chapter.

(3) No person shall, for the purpose of obtaining a narcotic drug, falsely assume the title of, or represent himself to be a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person.

(4) No person shall make or utter any false or forged prescription or written order for any narcotic drug.

(5) No person shall affix any false or forged label to a package or receptacle containing narcotic drugs.

Parenthetically, it is noted there are no exemptions from the prohibitions hereinabove listed.

Section 398.09, F. S., to the extent pertinent to the answer to your question, provides as follows:

398.09 Exceptions.—Except as otherwise in this chapter specifically provided, this chapter shall not apply to the following cases:

(1) Prescribing, administering, dispensing or selling at retail of any medicinal preparation,

(a) Those commonly known as class X preparations that contain in one fluid ounce, or if a solid or semi-solid, in one avoirdupois ounce,

1. Not more than one grain codeine,

2. Not more than one-half grain dihydrocodeine,

3. Not more than one-quarter grain ethyl morphine,

4. Not more than one-quarter grain morphine,

5. Not more than two grains opium,

6. Pharmaceutical preparations in solid form containing not more than 2.5 milligrams diphenoxylate and not less than 25 micrograms atropine sulfate per dosage unit,

7. And not more than one of the drugs named above in subparagraphs 1.-5., and 6,

(b) Those commonly known as class M preparations, which contain noscepine (narcotine), papaverine, narceine or cotarnine or any of their salts, without limit as to quantity, combined with active or inactive non-narcotic ingredients of the type used in medicinal preparations.

* * * * *

It is further noted that the exceptions listed above are conditional exceptions:

398.09 Exceptions.—

(3) The exemptions authorized by this section shall be subject to the following conditions:

(a) No person shall prescribe, administer, dispense, or sell under the exemptions of this section, to any one person, or for the use of any one person or animal, and no person shall purchase or possess, any preparation or preparations included within this section, when he knows, or can by reasonable diligence ascertain that such prescribing, administering, dispensing, selling, purchasing, or possessing, will provide the person to whom or for whose use, or the owner of the animal for the use of which such preparation is prescribed, administered, dispensed, sold, purchased, or possessed, within forty-eight consecutive hours, with more than, two grains codeine, one grain dihydrocodeine, one-half grain ethyl morphine, one-half grain morphine, four grains opium, or will provide such person or the owner of such animal, within forty-eight consecutive hours, with more than one preparation; provided, however, that the foregoing limitations shall not apply to physicians acting in good faith in the course of their professional practice, in prescribing for patients afflicted with disease, whose suffering can only be alleviated by administration of narcotic drugs in greater quantities than those specified herein.

The remaining part of your question in substance asks if there is any language in §398.19(6), F. S., that has any bearing on the exemptions listed. Section 398.19(6), F. S., provides as follows:

(6) The provisions of this section shall apply to all transactions relating to narcotic drugs under the provisions of §398.-09, in the same way as they apply to transactions under all other sections.

To give to the sections above quoted their ordinary meaning, indicates that §398.19(6), *supra*, is intended to say that cases not falling within the exemptions as set forth in §398.09(1)(a),(b), *supra*, will be controlled by this chapter. Furthermore, if fraud or deception is practiced by anyone in obtaining any amount of any narcotic preparation, the conditional exemption set forth in §398.09(1)(a),(b), above does not apply.

The answer to your question now appears clear that Class X and Class M preparations are conditionally exempt as long as the cases come within the limitations of §398.09, *supra*. Anyone who by false representations, obtains any narcotic drug offends this law.

This conclusion finds support in construing a like term by a sister state in the case of *Merritt v. State*, 198 N.E.2d 867, viz:

It is therefore apparent that the exemptions provided in Section 8 (§10-3526) of paregoric containing two grains or less of opium, is not an exemption applicable to the section on fraud and deceit, since it specifically excludes that exemption from its application to that section. (Emphasis supplied.)

It is my hope that this advice will be of help to you in the performance of your duty.

067-51—August 10, 1967

JURORS AND JURIES

EXEMPTION FROM JURY SERVICE OF "PRACTICING PHYSICIANS AND SURGEONS"

To: Willis A. Morton, Commissioner of Jurors, Rockledge

QUESTION:

Under §40.08(2), F. S., does the term "practicing physicians and surgeons" relating to exemption from jury duty, apply to and embrace the following:

1. Chiropodists or podiatrists
2. Chiropractic physicians
3. Oculists
4. Optometrists
5. Veterinarians?

The answer in part has been given from time to time on related questions and some are here referred to and drawn upon in supplying answer to your question.

As to chiropodists, the very same question was asked of one of my predecessors in office and an answer given as reflected in opinion issued Jan. 24, 1958, 058-25. The opinion there given was that the legislature, in employing the term "physicians and surgeons," did not intend to embrace those practicing the profession of chiropody. Subsequent to the giving of the above-mentioned advice, this office has given consideration to a related question, viz.: construction on insurance contracts relating to medical practice, and the conclusion therein reached was that a person licensed to practice chiropody falls within the provisions of disability contracts defining "physician" as one licensed to practice medicine and that one engaged in the practice of chiropody is engaged in the practice of medicine limited by Ch. 461, F. S. The rendering of this latter opinion makes it necessary to correct the advice given in AGO 058-25. Therefore, in the light of what was said in AGO 062-40 and

being convinced that the conclusion reached in AGO 058-25 is erroneous, I am of the opinion that practicing chiroprodists are entitled to be exempt from jury duty as practicing physicians.

This office, by AGO 049-488, Oct. 12, 1949, gave advice that chiropractors were embraced within the term "licensed physician or surgeon" as used in an insurance contract and, in so doing, pointed out that this office had decided so in AGO 046-195, May 8, 1946, basing that decision on AGO 041-166, Mar. 25, 1941, to the effect that a chiropractor falls within the term "qualified physician or surgeon" in construing language in the Workmen's Compensation Law. Therefore, I have the opinion that practicing chiropractors fall within the term "practicing physicians" as used in describing exemption from jury duty in §40.08(2), F. S.

In regard to your question as to oculists, you are advised that oculists or ophthalmologists are qualified in the practice of medicine and surgery in the treatment of the eye of the human being and, when practicing, fall within the definition of "practicing physicians." In *New Jersey State Board of Optometrists v. S. S. Kresge Co.* (1934) 113 NJL 284, 174 A. 353 Mod. 115 NJL 495, 181 A. 152, the court gave the following definitions:

Oculists and ophthalmologists pursue a calling quite distinct from that of optometrists. The first has relation to the practice of medicine and surgery in the treatment of diseases of the eye, and the second to the measurement of the powers of vision, and the adaptation of lenses for the aid thereof. . . .

From what is said in the definitions above given, it appears that oculists and ophthalmologists are considered within the healing arts.

Again, you are referred to a prior opinion of this office, Mar. 17, 1965, where a question was asked and answer given in relation to naturopathic physicians and particularly to a general statement which fortifies the advice hereinabove set forth:

The Florida Statutes regulating medical physicians (Chapter 458), osteopaths (Chapter 459), Chiropractic (Chapter 460), Chiropody (Chapter 461), Naturopathy (Chapter 462), and dentistry (Chapter 466), appear to cover the field of medical practice in the state. These chapters constitute one overall regulation, with each practitioner of the healing arts being licensed to practice within the limitations of the statute applicable to his particular profession.

Therefore, I advise you that "optometrists" and "veterinarians" do not fall within the term "practicing physicians" in relation to §40.08(2), F. S., granting exemption from jury service.

067-52—August 10, 1967

COURTS

SHERIFF'S AUTHORITY TO REQUIRE PAYMENT OF COSTS BEFORE EXECUTING ARREST ORDER

To: *Howell W. Melton, Circuit Judge, St. Augustine*

STATEMENT OF FACT:

The sheriff of one county refuses to execute an arrest order issued by a judge of another county in a support action because of defendant's failure to appear at a hearing to show cause why he should not be held in contempt. The sheriff has demanded payment in advance of the following costs:

\$7.50	Arrest
2.00	Commitment and release
.25	Return
5.40	Mileage (36 miles)
2.50	Jail board (2 days based on \$1.25, if longer it will be at this same rate)

\$17.65

QUESTION:

Does a county sheriff have the authority to require payment of costs by plaintiff in a civil action prior to executing the arrest order issued by the court of another county or circuit?

At the outset, it appears necessary to distinguish between the two types of contempt. In AGO 061-121, July 28, 1961, this office stated:

A "criminal contempt proceeding" is between the public and defendant, is not directly a part of the original cause and involves punishment for offense against the court itself as distinguished from the commission of an act in derogation of the rights of a party to the cause.

A "civil contempt proceeding" naturally involves in some measure a transgression against dignity of court and proceedings of its order, but is in actuality a proceeding between the parties to a cause and is instituted and tried as part of the main case.

It appears that we are here concerned with a "civil contempt proceeding" when considered in light of the above definitions along with certain other case authority which bears this out. (*South Dade Farms v. Peters*, 88 So.2d 891; *Demetree v. State*, 89 So.2d 298; *Dykes v. Dykes*, 104 So.2d 598; *In re S.L.T.*, 180 So.2d 374.)

In such "civil contempt proceedings," there is no question as to jurisdiction of the original trial court. In *Prensky v. Prensky*, 146 So.2d 604 (1962), involving a petition for a rule to show cause in a support action, similar to the immediate one under discussion, the parties were former residents of Florida, one of which now lives in New York and the other in Mexico. The Third District Court of Appeal of Florida declared that:

... [S]uch a proceeding is a continuation of the original one, and reasonable notice which affords an opportunity to defend is sufficient to give the court jurisdiction of the parties for the enforcement of the decree. (See also *Kosch vs. Kosch*, 113 So.2d 547.)

This brings us to the main question of whether the sheriff can require payment of costs by the plaintiff prior to executing the arrest order for a judge in another county. In *Sweat v. Waldon*, 167 So. 363 (1936), a summons in chancery issued by an Eighth Judicial Circuit Judge was forwarded by counsel for the complainant to the Duval County Sheriff requesting service by him. The sheriff refused to do so until he had received payment in advance for his services. On appeal, the Supreme Court of Florida, speaking through Justice Terrell, said that fees collected by the sheriff represent charges which the state makes for services rendered by it through him, under the statute, and that the sheriff becomes the trustee of the state to collect and properly account for fees. Justice Terrell said:

... [W]e are driven to the ineluctable conclusion that the sheriff

may run his office on a cash basis, and require compensation for service of process in advance.

More recently, it has been said that the expenses of serving a writ of ne exeat issued by an equity court is a "civil cost" which should be paid by the person requiring the writ, or as directed by the court. (AGO 059-30, Feb. 6, 1959.)

The question at hand was clarified to a great extent by a still later opinion of this office, AGO 061-121, July 28, 1961. In that case there was discussed the similar question of whether the sheriff could collect fees in connection with a civil contempt proceeding under the provisions of §30.51(2), F. S., which reads:

... The fees authorized, or a deposit sufficient to cover them, shall be collected in advance from the party who requests the service; provided, that services may be performed for any governmental agency or unit without advance payment, and the officer shall bill and collect the fees earned from such agency after the service is performed or when the amount due is determined.

The conclusion of that opinion was that the sheriff could collect fees or a deposit from the party seeking service of a rule to show cause order in a civil contempt proceeding. If the defendant was found guilty of contempt, the fees would be paid from the fine, and the money, constituting a deposit, would be returned to the plaintiff. The rule of the opinion limited such a deposit to cover only those expenses included under §30.23, F. S., and specifically excluded it from the application of §§30.24 and 30.25, F. S.

Based on the above 1961 Opinion, I am inclined toward the same view for the immediate case with one possible reservation. Since that opinion was rendered, §30.231, F. S., was enacted by the 1963 Legislature. It provides for a flat fee of \$5. "... for each service of a summons or writ, except witness subpoenas and executions ...", superseding §30.23, F. S., to that extent. In light of this, the question must be answered as to whether an arrest order is a "writ."

Although the statute is not absolutely clear on this point, it is not believed to have been the intent of the legislature to include arrest orders under this classification and thus under a flat \$5 fee. Black's Law Dictionary gives a general definition of "writ" as follows:

A precept in writing, couched in the form of a letter, running in the name of the king, president, or state issuing from a court of justice, and sealed with its seal, addressed to a sheriff or other officer of the law, or directly to the person whose action the court desires to command, either as the commencement of a suit or other proceeding or as incidental to its progress, and requiring the performance of a specified act, or giving authority and commission to have it done.

According to Words and Phrases, Vol. 45, p. 558, "A writ is mandatory precept issuing from court of justice." (*Poirer v. East Coast Realty Co.*, 152 A. 612, 613, 84 N.H. 461). This reference also cites *Stoddard v. Couch*, 23 Conn. 238, 240, saying that "the term 'writ,' as used in the Connecticut statutes, generally means process in a civil suit, while that in a criminal case is usually denominated a 'warrant.'"

Therefore, I conclude that the sheriff in the immediate case was not bound by the application of §30.231, F. S. The deposit for arrest; commitment and release; return; and mileage would appear to be appropriate, inasmuch as §30.23, F. S., specifically provides for them at the rates charged by the sheriff under discussion. The charge of \$2.50 for jail

board does not appear to be justified inasmuch as it comes within §30.25, F. S., which has been specifically omitted by the rule of the above-cited AGO 061-121, July 28, 1961. We do consider said opinion to be controlling in this instance.

067-53—August 10, 1967

SUSPENSIONS

OFFICERS UNDER §15, ART. IV, STATE CONST., PRIOR TO CONVENING OF LEGISLATIVE SESSION—POWER OF GOVERNOR

To: Claude R. Kirk, Jr., Governor, Tallahassee

QUESTION:

May the Governor of Florida suspend an officer subject to suspension or removal, under and pursuant to §15, Art. IV, State Const., on the day that the legislature is convened in regular or special session, at any time prior to the convening of said session?

The Justices of the Supreme Court of Florida, in their Advisory Opinion to the Governor, 69 Fla. 508, 68 So. 450, text 451, remarked:

... [W]e are of the opinion that the power of the Governor to simply suspend an officer exists only between the sessions of the Senate, and that while the Senate is in session he cannot, during such session, suspend an officer but can then only recommend to the Senate then in session a permanent removal of such officer.

In *State v. Joughin*, 103 Fla. 877, 138 So. 392, text 396, the court, after referring to the above-mentioned advisory opinion to the governor, said that:

The Governor was, in effect, advised that under such circumstances he could not suspend; that his power to suspend existed only between the sessions of the Senate; and that during a session of the Senate, if a cause of suspension was brought to his attention, he should recommend to the Senate permanent removal of the officer.

In *State v. McDonald*, 154 Fla. 456, 18 So.2d 16, text 19, the supreme court remarked that:

The power of the Governor under section 15, article IV, to suspend an officer exists only between the sessions of the Senate and not during the period the Senate is in session; the Governor is without power to suspend but can recommend to the Senate (while in session) the permanent removal of such officer.

In *State v. Sullivan*, Fla., 52 So.2d 422, text 425, the Supreme Court of Florida remarked that:

The Governor may not suspend an officer while the Senate is in session, but may recommend his removal to the Senate, and if the Senate concurs the removal is effected.

The sum and substance of these expressions of the Justices of the Supreme Court of Florida, and by the court itself, is that the governor may not make suspensions of state and county officers, under §15, Art. IV, State Const., while or during the time the Florida Senate is in session. Does the rule mentioned in 86 C.J.S. 900 and 901, §16, apply, that is, the rule: "In the computation of time, a day is to be considered

as an indivisible unit or period of time, and thus it is frequently stated that the law will not recognize or take cognizance of fractions of a day."? Here we are not dealing with a period of time measured by a day or days, but with periods of time when the legislature is in session, and when it is not in session. In *Tappy v. State*, Fla., 82 So.2d 161, the then Acting Governor of Florida made an appointment on the first Tuesday after the first Monday in Jan., 1955, sometime prior to the swearing in of the incoming governor, which appointment was questioned by the incoming governor, on the ground that the outgoing governor had no authority to make such appointment at any time after the beginning of the first Tuesday after the first Monday in said Jan. in said 1955. This the court rejected, holding that the powers of the outgoing governor continued until the incoming governor was sworn in. Here the court refused to follow the rule mentioned in said 86 C.J.S. 900 and 901, §16, and took into consideration two parts of the said first Tuesday after the first Monday in Jan. 1955.

The Governor of Florida, on the morning of April 4, 1967, and prior to the convening of the Florida Senate on said day at 11:00 A.M. suspended one L. M., a constable, from office which suspension was duly reported to the senate by the governor (Senate Journal of April 17, 1967, p. 103), together with a recommendation for removal, which was received by the senate, pursuant to which the president thereof appointed a committee of senators to make recommendations on what action should be taken on the governor's recommendation. The report of the said committee to the president of the senate was that the said constable not be removed from office. Here the senate appears to have recognized the right of the governor to suspend an officer, under §15, Art. IV, State Const., on the day of the convening of the legislature, provided that such suspension be made by the governor prior to the convening of the senate. This right of suspension by the governor is suspended from the convening of the senate until its sine die adjournment.

The above-stated question is answered in the affirmative. The records of the governor's office should show that the suspension order was made prior to the actual convening of the legislature.

067-54—August 14, 1967

CONSTITUTIONAL "CABINET" OFFICERS

POWERS AND FUNCTIONS OF THE EXECUTIVE AND ADMINISTRATIVE BRANCHES OF GOVERNMENT— SCHEDULED MEETINGS

To: *Tom Adams, Secretary of State, Fred O. Dickinson, Jr., State Comptroller, Broward Williams, State Treasurer, Tallahassee*

QUESTION:

Does there exist a legal reason why the respective governing boards and commissions, having membership comprised of the various constitutional "cabinet" officers should not meet at the usual time and place in the executive offices on Tuesday, August 15, 1967 to carry on public business in the absence of the governor?

Although it has been said that the "cabinet" concept is unique in modern government practice, the pattern was established by the original 13 states as a system providing for decentralization of the executive and administrative responsibility for state governments. Since the

colonies had often suffered under arbitrary and tyrannical acts of colonial governors, as state governments were established, administrative authority was divided so that too much authority would not be vested in the governor. The method adopted and followed was to limit and separate the powers and functions of the executive branch of the state government by dividing executive and administrative authority among a number of offices and departments, each headed by an elective official and each independent of and not directly responsible to the governor, but, being elective, having direct responsibility to the people.

Presently Florida's governmental structure, true to the traditional pattern set in the original 13 states, constitutionally provides for decentralization of executive and administrative authority. True also to the traditional pattern of growth followed generally in other states, Florida's governmental machinery has grown by spreading new functions over a multitude of new agencies, by appropriate legislative action. By and large, the membership of agencies, boards and commissions, statutory and constitutional, is some, or all, of the 7 elected officers of the executive department; that is, the governor and the cabinet.

Section 5, Art. IV, State Const., provides that:

... The Governor shall transact all Executive business with the officers of the Government, civil and military, and may require information in writing from the administrative officers of the Executive Department upon any subject relating to the duties of their respective offices.

Section 20, Art. IV, State Const., provides that:

... The governor shall be assisted by administrative officers as follows: A secretary of state, attorney general, comptroller, treasurer, superintendent of public instruction, and commissioner of agriculture, who shall be elected at the same time as the governor and shall hold their offices for the same term. . . .

Note should be taken here of the fact that the term cabinet appears for the first time in the 1941 revision or codification of the 1885 Constitution and is used only as a publisher's or codifier's heading for several of the sections of Article IV. It does not appear in the constitution as a substantive part of the language of that document. The cabinet as referred to in the Constitution is simply a descriptive term used when speaking collectively of the secretary of state, the attorney general, the comptroller, the treasurer, the superintendent of public instruction, and the commissioner of agriculture. The cabinet, unlike the various constitutional and statutory boards and agencies comprised of the governor and the administrative officers or some of them, is not a legal entity nor a public body, nor is it even a deliberative body.

So it is, as provided in the constitution, that the governor may require information from the administrative officers, and that the administrative officers shall assist the governor in the performance of his duties. Careful attention should be taken that, in addition to these things required of the administrative officers of the executive department to be performed, each of these officers has his own separate, clearly defined, constitutional duties.

While the constitution creates several boards, such as the Board of Commissioners of State Institutions, the Pardon Board, the State Board of Education, and the Board of Administration, the membership of which is composed of the governor and some, or all as the case may

be, of the members of the cabinet, the Constitution of the State of Florida is a document of limitation of powers as contrasted to a grant of powers as in the Constitution of the United States. Florida's Legislature may, therefore, exercise such powers as are not prohibited by the State Constitution.

In the exercise of this power the legislature, in its wisdom, determined that much of the state's business shall be conducted by various boards and agencies. Many have been created, with authority to perform certain specific functions, with membership on the board or agency being given to all seven of the elected officials of the executive department, or combinations thereof. The governor is not always designated as chairman or even as a member, although the legislature could have designated such membership or chairmanship, had wisdom dictated this path.

The people's business, by long-standing custom and tradition, is usually transacted in what is generally called and known by the public as "cabinet meetings." The governor and the elected administrative officers, when sitting as the constitutional or statutory members of a constitutional or statutory board, agency or commission, are generally referred to as the governor and the cabinet. These cabinet meetings are held weekly, customarily. So firm and well-known is this consistent custom of weekly meetings that cancellations for holidays or other special occasions have occurred only after prior majority affirmative action.

The authority to structure the body and adopt operating rules and procedure is inherent. For example, the board of administration is a constitutional body pursuant to §16, Art. IX, State Const., and is composed of the governor and two elected administrative officers. The constitution designates the governor as the chairman but does not further organize the board. The Supreme Court of Florida, in *State v. State Board of Administration*, 25 So.2d 880, held that even though a statute designated the comptroller as secretary to the board, the board had the right to adopt its own mode and form of organization and its election of the treasurer as secretary to the board was a valid election. Certainly, then, where neither the constitution nor the creating statute organizes the board, the board has inherent authority and the duty to organize itself and to adopt its own mode of procedure. Additionally, Ch. 120, F. S., grants to boards, commissions, departments or officers authorized to do so the authority to make rules and to govern its organization and the manner and order in which it shall conduct its business.

With reference to the ex officio duties imposed upon the governor and the other administrative officers of the executive department, the supreme court, in the case of *Holland (as Governor) v. Watson (as Attorney General)*, 14 So.2d 200, said in connection with the Board of Administration that "its purpose is primarily one of fiscal administration and in performing the duties laid on them, the members of the Board act without reference to their duties as state officers." In effect the constitution provides certain specific duties for the governor and for the six elected administrative officers of the executive department and that, in addition, each of these officers has statutorily imposed duties unconnected with his constitutional duties when serving as a member of one of the several boards, commissions, or agencies.

Each of these boards, commissions or agencies has the duty and the power to provide for or adopt its own mode or form of organization, if not otherwise specifically provided by statute. The duties per-

formed as members of such boards and commissions are without reference to their constitutional duties as state officers. It follows then that each of the several boards and agencies has the authority to determine who shall be its chairman, or its secretary, where and when it shall meet and the order in which its business shall be performed, and to adopt such rules and regulations as may be necessarily proper to hear and determine by the exercise of its collective judgment and discretion all questions or matters concerning the people's business properly presented to it.

It is without question that where a statutory board or agency consists of three or more members, the board or agency may conduct its business and its authority may be exercised by a quorum consisting of a majority of, but less than all of, its members if all members had notice of the meeting and had been given an opportunity to be present. This was the common law, and remains unchanged by the Constitution or Statutes of Florida. Reference is directed to the case of *Rex v. Mayor, etc., of Shrewsbury*, decided in the eighth year of the reign of Charles II, who was King of England from 1727 to 1760, and, therefore, a part of the Common Law of England in force on July 4, 1776, and in Florida today.

Authority is ample also for the principle that if a quorum is present at any regularly scheduled time and place for a meeting, a majority of those present may lawfully transact the business of the board or agency. Regularly scheduled meetings may be set by statute, by rule, or by custom and tradition, and the latter, because of general public knowledge of the fact and the reliance thereon, is most persuasive and conclusive. After all, right of timely redress is meaningless if early opportunity is thwarted without remedy.

Except in the case of the Outdoor Recreational Development Council, which by statute requires the governor to vote in the majority before the council may take action, there is no statutory agency that gives either the governor or other executive officer greater authority than any other member.

Therefore, the aforementioned council excepted, if a quorum is present at a regularly and traditionally relied upon scheduled meeting, a majority of those present may lawfully conduct the business of the people. However, if the meeting is one not regularly scheduled, all members must be notified and given an opportunity to be present.

In response to your specific question, it is my opinion as Attorney General that there appears to exist no legal reason why the respective governing boards and commissions, having membership comprised of the various constitutional cabinet officers, should not meet at the usual time and place in the executive offices on Tuesday, Aug. 15, 1967, to carry on public business.

067-55—August 17, 1967

LEGISLATION

RECALL AND RECONSIDERATION OF VETOED BILL BY GOVERNOR

To: *Tom Adams, Secretary of State, Tallahassee*

QUESTION:

Does the governor have the constitutional power to recall for reconsideration a bill vetoed by him and filed with the secretary of state?

Senate Bill 317 was duly passed by the legislature on July 13, 1967, and the enrolled act was presented to the governor for his approval or disapproval on July 25, 1967. The governor disapproved or vetoed the bill on Aug. 2, 1967, and filed the bill, with his objections or veto message attached thereto, in the office of the secretary of state on Aug. 3, 1967. All of the acts of the legislature and of the governor were performed in the manner and within the time prescribed by the fundamental law.

In this instance, the constitution gave the executive 20 days from the final adjournment of the 1967 Extended Regular Session of the Legislature, or until midnight on Aug. 3, 1967, for consideration of Senate Bill 317. If he had neither approved nor disapproved nor vetoed the bill within that time, the bill would have become a law by operation of §28, Art. III, State Const. When the governor within such time files a bill, with his objections thereto, in the office of the secretary of state, he thereby prevents such bill from becoming law, unless at the next session of the legislature, on reconsideration, it is approved by the legislature by receiving two thirds of the votes present, notwithstanding the governor's objections thereto.

The question presented by your inquiry goes to the power of the executive to recall or take an enrolled act of the legislature, with his objections thereto, from the office of the secretary of state and further consider his disapproval of such act, or further exercise the power of the executive over the legislation, or conclude as to his course upon it. This issue has not been before the Florida Supreme Court, and there are no Florida judicial precedents which would throw any light upon the question. Neither has this office issued any opinions on this question.

Section 28, Art. III, State Const., provides that every bill that may have passed the legislature shall, before becoming a law, be presented to the governor for his approval or disapproval, and that if the legislature, by its final adjournment, shall prevent the return of any bill with his objections to the house in which it originated, such bill shall become a law "unless the Governor within twenty (20) days after the adjournment, shall file such bill, with his objections thereto, in the office of the Secretary of State, who shall lay the same before the Legislature at its next session."

Section 21, Art. IV, State Const., provides that "... The Secretary of State shall keep the records of official acts of the Legislative and Executive Departments of the Government, and shall, when required, lay the same, and all matters relative thereto, before either branch of the Legislature. . . ."

Section 15.01, F. S., makes the secretary of state the custodian of the original statutes of the state, and requires him to keep in his office a register and an index of all official communications, messages, documents and other official acts issued or received by the governor or himself, and to record the same in a book numbered in chronological order. Section 15.07, F. S., provides, among other things, that all original acts and resolutions passed by the legislature, and all other original papers acted upon thereby, shall, immediately upon the adjournment thereof, be deposited with and preserved in, the office of the secretary of state, by whom they shall be properly arranged, classified, and filed.

It is my constitutional and statutory duty, upon your written requisition, to give you my official opinion and legal advice on any matter touching your official duties. But the essential question inherent in your inquiry going, as it does, to the constitutional rights and

powers of the chief executive on matters basic and fundamental to our constitutional scheme of government, I would ordinarily ask your indulgence in deferring the rendition of an official opinion to you on the problem submitted to me, and suggest that his excellency request an advisory opinion of the justices of the supreme court as to his constitutional rights and powers in this matter under the authority of Art. IV, §13, State Const. However, it would appear from *In re Executive Communication, Opinion Concerning Powers of Legislature* (Sup. Ct. of Fla., May 9, 1887), 23 Fla. 297, 6 So. 925, that the governor would not have a right to require such an opinion of the justices and that compliance on their part with any such request would be an unauthorized excursion. That opinion holds:

Any duty imposed by the constitution on the governor with reference to a bill, before it becomes a law, is not an executive duty. The enactment of laws is a legislative duty, and, when your excellency is required by the constitution to do any act which is an essential prerequisite thereto, such act is legislative, and is performed by you as a part of the law-making power, and not as the law-executing power. We are of the opinion that the question affects a legislative duty imposed by the constitution; and, believing that a compliance on our part with your request is unauthorized by the constitution, we, with great respect for your excellency, beg to be excused from expressing opinions on the question submitted.

The secretary of state is, by the organic and statute law, made the custodian of the records evidencing the official acts of both the executive and the legislature, including enrolled bills accompanied by veto messages. As noted above, the governor, insofar as the functions of approval or disapproval of bills is concerned, is a part of the law-making power, and the constitution requires the concurring acts of the two houses of the legislature, and of the executive in approving, or determining to withhold his approval from, legislation in the manner therein pointed out. The office of the custodian of the records of the legislature and the executive is the only place where record evidence of the official acts of the governor or legislature may be found, and his office is the place where the citizen or governmental official applies for official information in reference to such official acts, and as to whether acts passed by the legislature have or have not become law. When enrolled acts of the legislature, accompanied by the objections of the governor thereto, have passed into the hands of this custodian, they should be recognized as having thus far passed through the ordeal provided by the constitution for becoming a law, and constitute record proof that such acts have not and will not become law, unless at the next session of the legislature, on reconsideration thereof, they are approved by the legislature in the manner prescribed by the constitution, notwithstanding the governor's objections thereto.

There is no constitutional or statutory authority for a return of an enrolled act of the legislature, with the governor's veto message attached thereto, from the secretary of state to the governor for his reconsideration of his disapproval or veto of such act, and the legal effect of his deposit of such an act, with his objections thereto with the secretary of state within 20 days following the adjournment of the legislature, could not be affected by the physical return of the document by the secretary of state to him. Accord, Ind. Opinions of Attorney General, 1961, #12.

The governor's rights and his duties with respect to the function of approving or disapproving bills are limited by the constitution, and the constitution fixes the limit of time during which the executive may retain a bill in his control for consideration and reconsideration or the exercise of his constitutional discretion over the legislation. See, *Powell v. Hayes* (Ark. 1907), 104 S.W. 177; *People v. McCullough* (Ill. 1904), 71 N.E. 602; *State v. Junkin* (Neb. 1907), 113 N.W. 256.

There must of necessity be, and there is, some point of time when the power of the executive over a bill ends. That point of time must be reached when the constitutional power of approving a bill, or determining to allow a bill to become law without his approval upon the running of the 5 or 20-day period, as the case may be, prescribed by §28, Art. III, State Const., or returning the bill, with his objections thereto, within the time limited by the constitution, has been exercised by the executive. In this instance, the last act is the filing of the bill with his objections thereto in the office of the secretary of state. Upon the performance of that act in the exercise of his official discretion, his power over the bill has terminated.

When the executive passes the bill beyond his control, his constitutional power is exhausted and he may no longer deliberate or retract. He and all others are concluded, and the record which declares his acts can alone speak his intentions. Within the time fixed by the constitution, the governor may consider and reconsider a bill. He may change and rechange his mind upon the merits of the bill before him. But when he has exercised his power over it, either by approval or veto, then the action is final and irrevocable. The law has given him in one case 5 days and in the other, 20 days, for consideration; and when that consideration has been given, when that discretion has been exercised, when the last act has been performed, then the bill is beyond his control or power. See, *Powell v. Hayes*, *supra*; *People v. McCullough*, *supra*; *State v. Junkin*, *supra*; *Cammack v. Harris*, (Ky. 1930), 29 S.W.2d 567; *Smith v. Mitchell* (W. Va. 1911), 72 S.E. 755; *Tarleton v. Peggs*, 18 Ind. 24; *Woessner v. Bullock* (Ind. 1911), 93 N.E. 1067; *Marbury v. Madison* (U.S. Sup. Ct. 1803), 2 L. Ed. 60; also see, 1 *Cooley's Constitutional Limitations*, 8th Ed., 320 *et seq.*

The governor, within the time given him by the constitution for the approval or disapproval of Senate Bill 317, having made a record in the office of the secretary of state of his final action, that record is conclusive, and the veto was irretrievably consummated when the bill carrying it was deposited with the secretary of state. The bill was no longer susceptible to the exercise of the lawmaking power, or of executive judgment, and the governor had put it beyond his power in any manner to affect the measure one way or the other. In this situation, the duty devolved on the secretary of state to lay the bill with the governor's objections thereto before the legislature at its next session for its reconsideration as provided by the constitution.

In connection with your constitutional duty to present this bill and accompanying veto message to the "next session" of the legislature, you may be interested in the observations made in my letter of Aug. 15, 1967, to Senator John E. Mathews, Jr., in which I held that while it is not mandatory that the legislature consider the governor's current veto messages until the next regular session of the legislature, the legislature, by two-thirds vote of each house, may consider such veto messages at an extra or special session convened pursuant to the governor's proclamation, prior to the 1969 Regular Session. See also, AGO 061-97, June 16, 1961.

In consideration of the foregoing, I am of the opinion that when the governor filed Senate Bill 317 with his objections thereto in your office, his constitutional power over the bill was exhausted and it thereby passed beyond his control, and he had no power thereafter to take the bill from your office and further deliberate upon it. But for the intervention of the executive, this bill would have become law on Aug. 4, 1967, but the time given him by law to participate in the law-making processes has elapsed and with its passage, his right to concur in the approval of this legislation was extinguished. You have neither the constitutional authority nor duty to return this bill and attached veto message to the governor for his reconsideration thereof, but you are under the constitutionally imposed duty to lay the bill and accompanying veto message before the next session of the legislature for its reconsideration thereof.

067-56—August 21, 1967

WITNESSES

SUBPOENAS ISSUED WITH CLERK'S SIGNATURE AND SEAL BUT OTHERWISE BLANK

To: *Arthur H. Beckwith, Jr., Clerk of Circuit Court, Sanford*

QUESTION:

What is the authority for the clerk of the circuit court to issue, in criminal matters, subpoenas or subpoenas duces tecum which are signed and sealed by him but are otherwise in blank?

As to subpoenas to procure witnesses at the trial of a criminal case, §932.26, F. S., provides that:

932.26 Witnesses; all names to be included in one subpoena.—When possible, the names of all witnesses summoned for, or at the cost of, the state in a criminal case shall be included in one subpoena, and the prosecuting officer shall, when possible, include the names of all such witnesses in one praecipe for such subpoena.

By enacting said section, the legislature evidenced its intent that a witness subpoena in behalf of the state in a criminal case shall name the witnesses to be subpoenaed.

As to subpoenas for witnesses to appear before the state attorney for investigative purposes. Section 27.04, F. S., says that the state attorney:

... [I]s allowed the *process of his court* to summon witnesses ... to appear before him ... to testify before him as to any violation of the criminal law upon which they may be interrogated. ... (Emphasis supplied.)

The word "process," as used in said statute, means "subpoena" or "subpoena duces tecum." There is no statute or court rule which provides for the issuance of either a subpoena or a subpoena duces tecum in blank, with no witnesses named therein, for the purpose of procuring the attendance of witnesses before a state attorney, and, in the absence of such a statute or court rule, I think that a document signed and sealed by the clerk in blank, which does not name the witness or witnesses to be subpoenaed, does not constitute a subpoena or a subpoena

duces tecum and is not "process of the court" within the contemplation of §27.04, F. S.

Therefore, it is my opinion that you, as Clerk of the Circuit Court, are not authorized to issue either a subpoena or a subpoena duces tecum in a criminal matter of any kind unless it names the witnesses to be subpoenaed at the time you issue it.

As to witness subpoenas in civil cases. A different rule obtains in civil cases because Rule 1.410(a), Florida Rules of Civil Procedure provides that:

(a) For Attendance of Witnesses; Form; Issuance. Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. *The clerk shall issue a subpoena or a subpoena for the production of documentary evidence signed and sealed but otherwise in blank to a party requesting it who shall fill it in before service without praecipe.* (Emphasis supplied.)

This rule authorizes the clerk to issue either a subpoena or a subpoena duces tecum, signed and sealed by him but with no witnesses named, and authorizes the party requesting such subpoena to fill it in before it is served.

067-57—August 31, 1967

AD VALOREM TAXES—WALT DISNEY PRODUCTIONS

VALUATION OF PROPERTY OF WALT DISNEY PRODUCTIONS
IN ORANGE AND OSCEOLA COUNTIES—AD VALOREM TAX
PURPOSES—CONSTRUCTION OF §193.021, F. S., AND §1,
ART. IX AND §16, ART. XVI, STATE CONST.

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

What factors should be considered by the county tax assessors in arriving at the taxable value of lands purchased by the Walt Disney Productions for purposes of ad valorem taxation?

It appears from your request for an opinion of Aug. 9, 1967, and other information coming to my attention, that the Walt Disney Productions, mentioned in your request for opinion, have acquired, or will acquire, through a subsidiary corporation, approximately 27,000 acres of land in Orange and Osceola Counties, to be used for a Disneyland-styled theme park, similar in nature to the Disneyland development in California, as will more fully appear by reference to your request for opinion above-mentioned, and publications of Walt Disney Productions which have come to my attention.

Presently the only properties of Walt Disney Productions subject to ad valorem taxation would be the approximately 27,000 acres of land in Orange and Osceola Counties, above-mentioned, now in undeveloped condition. I have been advised by your request for opinion and representatives of Walt Disney Productions that they contemplate that over the next 15 years there will be established on the project lands a unique recreation oriented project consisting of closely interrelated recreational, industrial and transportation complexes. These complexes are to be created under a unitary master plan linking the

anticipated tourist visitors with the permanent residents of the area and making the facilities provided for in each such complex an integral part of the overall development. Our primary concern here is the taxable value of the said lands for purposes of ad valorem taxation.

The purpose of the lands in question being that of development over a period of several years, the said lands, by reason of such development, will vary in their valuation from time to time until such development has been completed, varying from tax year to tax year. In this opinion our primary concern appears to be that of valuation of taxable properties for purposes of ad valorem taxation.

Section 1, Art. IX, and §16, Art. XVI, State Const., constitute the fundamental law in this state for the imposition and collection of ad valorem taxes against taxable property having a situs in Florida. Section 1, Art. IX, State Const., insofar as the same relates to real and tangible personal property, provides that:

... The Legislature shall provide for a uniform and equal rate of taxation . . . and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal, excepting such property as may be exempted by law for municipal, education, literary, scientific, religious or charitable purposes.

Section 16, Art. XVI, State Const., also insofar as the same relates to real and tangible personal property, provides that:

... The property of all corporations . . . shall be subject to taxation unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes.

These constitutional provisions establish the rule under which ad valorem taxes are to be imposed upon real and tangible personal properties having their tax situs within the state.

Said §1, Art. IX, State Const., provides that:

[T]he Legislature . . . shall prescribe such regulations as shall secure a just valuation of all property, both real and personal, [for taxation purposes]. . . . (L. Maxcy, Inc., v. Federal Land Bank of Columbia, 111 Fla. 116, 150 So. 248, text 249).

In this case the court remarked that:

Undoubtedly the Legislature is without power to provide for exempting from taxation any class of property which the Constitution itself makes no provision for exempting. The principle has been more than once affirmed in this state that the Constitution must be construed as a limitation upon the power of the Legislature to provide for the exemption from taxation of any classes of property except those particularly mentioned classes specified in the organic law itself.

See also to the same effect State *ex rel.*, *Burbridge v. St. John*, 143 Fla. 544, 197 So. 131, text 134; *State v. Doss*, 146 Fla. 752, 2 So.2d 303, text 304; *Franks v. Davis*, Fla., 145 So.2d 228, text 231; *Palethorpe v. Thomson*, Fla., 171 So.2d 526, text 529. See also *Lanier v. Tyson*, Fla. App., 147 So.2d 365, text 374; *Daytona Beach Racing and Recreation Facilities District v. Paul*, 157 Fla. App. 156, text 161.

In said *L. Maxcy, Inc., v. Federal Land Bank* (150 So. 248, text 250), the Court, concerning a legislative method for securing a just valuation of taxable properties for tax purposes, remarked that:

That question is whether the statutory plan . . . in its practical application, *necessarily* results in the intentional omission, under authority or color of statutory law, of taxable property from the assessment rolls for an improper purpose, thereby unequally and inequitably adjusting the burdens of taxation, so as to render the entire assessment void for unconstitutional discrimination.

Only when property is held and used exclusively for some religious, scientific, municipal, educational, literary or charitable purpose will it be entitled to tax exemption. Section 1 of Art. IX, and §16 of Art. XVI, State Const., are limitations upon the power of the legislature to grant exemptions from taxation in this state. Only when held and used exclusively for one or more of the purposes mentioned in said constitutional provisions may the legislature provide exemption from taxation for such property.

The Supreme Court, in *Lummus v. Miami Beach Congregational Church*, 142 Fla. 657, 195 So. 607, text 608, remarked that:

Although we have been impressed with the plausible argument presented by counsel for appellant, we have the conviction that the command to tax all corporate property needs no legislation to accomplish the result intended and that the exception "unless . . . held and used exclusively for religious . . . purposes" may likewise be availed of by the appellee without enabling action by the legislature or resorting to the act to which we have so often referred.

The reference appears to have been to §897, C.G.L., 1927, now appearing as §192.06, F. S., providing for the exemption from taxation of several classes of real and tangible personal properties. See also *Fleischer Studios v. Paxson*, 147 Fla. 100, 2 So.2d 293, text 294, to the same effect.

In *City of Tampa v. Colgan*, 121 Fla. 218, 163 So. 577, text 582, the Supreme Court of Florida remarked that:

. . . Prospective value alone cannot be made the substantive basis of an assessment, but can be considered to the extent that it enters into, or is reflected in, present value. . . .

This statement is supported by an annotation in 24 A.L.R. 649-655.

The late Judge Jack F. White, of the District Court of Appeal of Florida, Second District, in *Lanier v. Tyson*, Fla. App., 147 So.2d 365, text 379, remarked that:

Assessed valuations of land based on estimates of its highest and best potential, as distinguished from present bona fide use, are bound to be largely conjectural; and when an assessor, contrary to legislative intent and direction, determines that land despite its present use has a truly higher present value because of its potential for some other "higher" purpose, he indulges in unwarranted speculation and does violence to the constitutional and statutory objective of just valuation. The assessor, like the courts, should operate within the record and not *de hors* it. (Emphasis supplied.)

This holding, although in a dissenting opinion, was approved by the Supreme Court, in *Lanier v. Overstreet*, Fla., 175 So.2d 521, text 524, as the controlling law. In said *Lanier v. Overstreet*, (So. text 524) the Supreme Court remarked that the legislature:

. . . By authorizing tax assessors (§193.021, Florida Statutes) to consider, as one of the factors "in arriving at a just valuation" of property, the use to which the property "can be expected to be put in the immediate future" the Legislature has, under the familiar rule of *expressio unius est exclusio alterius*, prohibited tax assessors from considering potential uses to which the property is reasonably susceptible and to which it might possibly be put in some future tax year or, even, during the current tax year. To be considered, the use must be *expected*, not merely potential or a "reasonably susceptible" type of use; it must be expected *immediately*, not at some vague uncertain time in the future. The reason for the legislative policy in this respect was well stated by Judge White in his scholarly dissenting opinion in *Lanier v. Tyson*. . . (Emphasis supplied.)

Real and tangible personal properties are, under the State Const., taxable at their "just valuation."

In *Tyson v. Lanier*, Fla., 156 So.2d 833, text 837, the court held the terms "just valuation" and "full cash value" to be legally synonymous terms; and in *Walter v. Schuler*, Fla., 176 So.2d 81, text 85, the terms "fair market value" and "just valuation" were held to be legally synonymous terms. From this we must conclude that the terms "just valuation," as used in the Constitution, and "full cash value," as formerly used in the statutes, and "fair market value," as used in *Walter v. Schuler*, *supra*, and in §193.21, F. S., are legally synonymous terms, and fix the measure of the taxable valuation of real and tangible personal property subject to taxation in the state.

It is stated in 51 Am. Jur. 655 and 656, §706, that:

As a general rule, land, in the absence of a qualifying statutory provision, is valued for purposes of property taxation at its then-present actual or market value, in fixing which the assessors take into consideration all facts directly affecting the value, including advantages of location, uses, etc. It would seem upon principle that *prospective value cannot properly be made the substantive basis of assessment* although it may be considered to the extent that it enters into, or is reflected by, present value. . . . (Emphasis supplied.)

The following authorities hold that when assessing real and personal properties for purposes of ad valorem taxation, prospective value cannot properly be made the substantive basis of an assessment, although it may be considered to the extent that it enters into, or is reflected by, the present value of such property. *Finch v. Grays Harbor County*, 121 Wash. 486, 209 P. 833, 24 A.L.R. 644; *Northern P. R. Co., v. Benton County*, 87 Wash. 534, 151 P. 1123; *Hillman's Snohomish County Land Case*, 87 Wash. 58, 151 P. 96; *State v. Flavell*, 24 N.J.L. 370; *State v. Illinois C. R. Co.*, 27 Ill. 64, 79 Am. Dec. 396; *People v. Hart*, 216 N.Y. 513, 111 N.E. 56; *Gerner v. State Tax Commission*, 71 N.M. 385; *People v. Stewart*, 315 Ill. 25, 145 N.E. 600, *Cotton v. Lexington, Mass.*, 158 N.E. 325; *Kentucky River Coal Corp. v. Knott County, Ky.*, 54 S.W.2d 377.

Section 193.021, F. S., which section was derived from Section 1, Chapter 63-250, Laws of Florida, requires that tax assessors "in arriving at a just valuation" as required by §1, Art. IX, State Const., shall take into consideration the following factors:

- (1) The present cash value of the property;
- (2) The highest and best use to which the property can be expected to be put in the immediate future; and the present use of the property;
- (3) The location of said property;
- (4) The quantity or size of said property;
- (5) The cost of said property and the present replacement value of any improvements thereon;
- (6) The condition of said property;
- (7) The income from said property; and
- (8) The net proceeds of the sale of the property, as received by the seller, after deduction of all of the usual and reasonable fees and costs of the sale, including the costs and expenses of financing.

In *Walter v. Schuler*, Fla., 176 So.2d 81, text 82 and 83, the Supreme Court of Florida considered the terms "just valuation," "full cash value" and "fair market value," when applied to real property, to be "legally synonymous" terms, and as being the amount a "purchaser willing but not obliged to buy, would pay to one willing but not obliged to sell." The term "fair market value" is often used to indicate the value of properties usually bought and sold with such frequency as to establish a market for the said properties. In order to establish such a market value, there must be a sufficient number of transactions, involving like or similar properties, from which a "fair market value" may be determined. The sales from which a fair market value may be determined must be of comparable properties (*Georgia-Pacific Corp. v. State Tax Commission*, 237 Ore. 143, 390 P.2d 337; *Oregon Portland Cement Co. v. Mack*, 230 Ore. 389, 369 P.2d 765; *Connecticut Light & Power Co. v. Town of Monroe*, 149 Conn. 450, 181 A.2d 118; *People v. Burke*, 247 N.Y. 227, 160 N.E. 13). In *People v. Mills*, 190 Misc. 277, 72 N.Y. So.2d 757, the court rejected an income approach to real property when the income was derived from a business venture operated on the lands instead of rentals received for the use of the lands; evidently no specified portion of said income was payable or allocated in lieu of rent or as rent.

When lands are to be valued for tax purposes by comparison to current sales of other lands, we must compare sales of comparable lands, at comparable locations, and suitable for comparable uses. Sales of tracts of lands, to be used for comparison purposes, must be sales of comparable lands, used for comparable purposes, sold under comparable facts and circumstances. Such lands must be lands subject to comparison. Sales of small tracts of land should not usually be used for the purpose of fixing the value of large tracts of land, but, if so used, care must be taken to make necessary adjustments so as to obtain a comparable valuation. Care should be taken that there is no temporary increase of valuation due to promotion, fraud or deceit calculated to cause inflation of the real estate market.

Prospective valuations should not be used, except to the extent that such prospective values have become permanent and no longer prospective. Sales of lands are not always by a "purchaser willing but not obliged to buy" from a seller "willing but not obliged to sell." The value of a 10,000-acre tract of land is not necessarily determinable from the consideration for a 1-acre tract, or a 10-acre tract, or even a 100-acre tract of land. The value of the 1-acre tract, the 10-acre tract, the 100-acre tract, and the 10,000-acre tract is the amount a purchaser

willing and able, but not obliged to buy would pay to a seller willing but not obliged to sell, for the land in question. There might well be considerable demand for 1-acre tracts, 10-acre tracts, and even 100-acre tracts when there would be no demand, also no takers, for the 10,000-acre tract. There might be sufficient demand and sales to fix a fair market value of the 1, 10 and maybe 100-acre tracts, but no sales of the 10,000-acre tracts from which a fair market value could be determined.

The demand for subdivision property for a populated area might be for 1,000 acres of suitable land; however, the available lands for subdivision purposes might be 5,000 acres or more. Should 1,000 acres of such land be purchased for said subdivision purposes, at a price of \$250 per acre, thereby filling the need for such type of property, we doubt that this sale of land should be deemed to fix the price of all the other lands suitable for subdivision purposes, in the absence of other sales from which a fair market value may be determined. See also the definitions of Market Price, Market Value, and similar terms in 55 C.J.S. 786-798; 55 C.J.S. 786-800.

The market value of land or real estate is the highest price estimated in terms of money that the land will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser buying with full knowledge of all of the uses and purposes to which it is adapted and for which it is capable of being used; the amount which land would bring if it were offered for sale by one who desired, but was not obliged, to sell, and was bought by one who was willing, but not obliged to buy; what the land would bring in the hands of a prudent seller, at liberty to fix the time and conditions of sale. . . . (Emphasis supplied.)

The purchase price of the lands, such purchase having been made recently, would seem to be about as good an indication of its taxable value as may be arrived at, if the lands were purchased by persons willing but not required to purchase from persons willing but not required to buy, that is, persons dealing at arm's length with each other.

067-58—September 8, 1967

PUBLIC OFFICES—DUAL EMPLOYMENT

SEEKING TWO OFFICES—LEGISLATOR AND CONSOLIDATED COUNTY GOVERNMENT

To: *Ted Alvarez, Jr., Representative, Tallahassee*

QUESTION:

May a member of the Duval legislative delegation run for office under the newly consolidated government in Duval County?

Section 5, Art. III, State Const., provides:

. . . No Senator or member of the House of Representatives shall during the time for which he was elected, be appointed, or elected to any civil office under the Constitution of this State that has been created, or the emoluments whereof shall have been increased during such time.

The consolidated government of Duval County was created under the provisions of §9, Art. VIII, State Const., implemented by Ch. 67-1320, Laws of Florida (HB 3029).

While the Supreme Court of Florida has said that this constitutional provision should be strictly construed to uphold the officer's eligibility if reasonably possible (*State ex rel Fraser v. Gay*, 158 Fla. 465, 28 So.2d 901), and has tended in recent years to allow members of the legislature under situations distinguished from this instance, to hold offices where they increased the emoluments thereof, there does not appear to be any decision which would clearly establish a legislator's right to hold one of the newly created offices under the consolidated government of Duval County in light of the restrictions in §5, Art. III, State Const.

Out of an abundance of caution I would, until the matter is decided with a greater degree of finality by way of an appropriate proceeding in a court of competent jurisdiction, take the position that §5, Art. III, State Const. would prohibit members of the 1967 Legislature from seeking offices under the consolidated government of Duval County.

067-59—September 8, 1967

PUBLIC OFFICERS AND EMPLOYEES

LEAVE OF ABSENCE FOR MILITARY SERVICE

To: *Melvin T. Dixon, State Service Officer, St. Petersburg*

QUESTIONS:

1. Who enforces §§115.14 and 115.15, F. S.?
2. What is proper procedure to be followed by former deputy sheriff and former county maintenance helper seeking reinstatement to county positions after service?

Sections 115.14 and 115.15, F. S., were enacted in 1941, and follow upon a series of statutes treating of the reemployment or reinstatement rights of officials, officers and employees of the state or any of its political subdivisions. See §§115.01-115.10, F. S.

To expedite consideration of the above-stated questions, §115.15, F. S., should be taken up, and disposed of, at the outset. The statute makes applicable to "this state" and the "refusal of any state, county or municipal official" to comply therewith, §308 of U.S.C.A., Title 50 App., which title was repealed effective April 1, 1944, and was replaced by Title 50 App. U.S.C.A. 459.

Title 50 App. U.S.C.A. 459 has to do with the reemployment rights of (A) employees of the United States or territorial governments, (B) employees of private employers, and (C) employees of "any State or political subdivision thereof. . . ." Whereas the congress explicitly directed reemployment of employees falling within categories (A) and (B), *supra*, and went so far as to provide means for enforcement of the rights thereby created, the employees falling within category (C), *supra*, are comforted only by "the sense of Congress," and are the beneficiaries of no specific or express enforcement devices.

Section 115.14, F. S., provides:

. . . All employees of the state, and of the several counties of the state, and of the municipalities or political subdivisions of the state, may, in the discretion of the employing authority of such employee, be granted leave of absence under the terms of this law, and upon such leave of absence being granted, said employee shall enjoy the same rights and privileges as are hereby granted to officials under this law, insofar as may be.

Directly, therefore, and before considering what "rights and privileges" the law grants to "officials," it must be determined that any state, county or municipal employee has in fact been "granted a leave of absence under the terms" of the law. Absent such a discretionary grant, this statute would appear to be inapplicable. See AGO 041-359, p. 112, 1941-1942 Biennial Report of the Attorney General; AGO 043-135, p. 168, 1943-1944 Biennial Report of the Attorney General; AGO 064-125, p. 430, 1963-1964 Biennial Report of the Attorney General—for tangential treatment of this point.

The requirement that application for leaves of absence to serve in the military be made to, and disposed of by the governor in his discretion (§115.10, F. S.) would appear to have been superseded and thereby altered by §115.14, F. S., which seemingly devolves such discretion upon the "employing authority" of the applicant for leave.

Beyond mere reinstatement, the party duly granted a leave of absence has preserved all "seniority rights, efficiency ratings, promotional status and retirement privileges." Also, for purposes of computing retirement entitlement, one's active military service is deemed to be "continuous service in the office" from which leave was obtained. See §115.12, F. S., as enlarged in and by §115.14, F. S.

In the absence of statutory enforcement machinery, the statutory rights or privileges hereinabove dealt with are enforceable judicially; i.e., through the state courts by the party affected by said rights or privileges.

067-60—September 8, 1967

EXECUTIVE ORDERS

SUSPENSION AND ASSIGNMENT ORDERS EXECUTED BY THE GOVERNOR AS PUBLIC RECORDS—NATURE AND MANNER OF PRESERVING, ETC.

To: *Claude R. Kirk, Jr., Governor, Tallahassee*

QUESTIONS:

1. Are executive orders such as suspensions and assignments of special prosecutors required to be countersigned by the secretary of state?
2. Are executive orders specifically relating to the assignment of state attorneys to make investigations which are delivered to the secretary of state for recordation in accordance with §15.01, F. S., available for public inspection?

Section 20, Art. IV, State Const., requires that the Governor of Florida be assisted by a secretary of state, an attorney general, a comptroller, a treasurer, a superintendent of public instruction and a commissioner of agriculture. Section 21, Art. IV, State Const., requires that:

... The Secretary of State shall keep the records of official acts of the Legislative and Executive Departments of the Government, and shall, when required, lay the same, and all matters relative thereto, before either branch of the Legislature. ...

Section 14, Art. III, State Const. of 1838, required that the secretary of state "keep a fair register of the official acts and proceedings of the Governor." Like provisions appeared in the State Constitutions of 1861 (§14, Art. III); 1865 (§15, Art. III). Section 17, Art. V, State

Const. of 1868 made provision for a secretary of state without detailing the duties to be performed by him. Secretaries of state of the several states are usually the custodians of the great seal of the state and are required to countersign and affix the state seal to commissions and other documents issued by the governor (81 C.J.S. 986, §64). The Secretary of State of Florida is required to keep records of the official acts of the governor. Under early British law there were 5 principal secretaries of state (one for the home department, one for foreign affairs, one for the colonies, one for war and one for India) who attended the king for the receipt and dispatch of letters, grants, petitions and other matters and documents relating to the affairs of state. (Black's Law Dictionary, defining secretary of state.)

The secretary of state, being required under §21, Art. IV, State Const., to "keep the records of official acts of the Legislative and Executive Departments of the Government," which includes the recording of the official acts of the governor, for which purpose he is given custody of the great seal of the state, by said section and article, and the further requirement in §14, Art. IV, State Const., that, "All grants and commissions shall be in the name and under the authority of the State of Florida, sealed with the great seal of the State, signed by the Governor, and countersigned by the Secretary of State," has been made the official custodian of the books and records of the official acts and documents reflecting the governor's official actions, orders and documents.

The words "countersign" and "attest," when used in connection with official governmental documents, each betoken personal acts of authentication of genuineness of an act or document of an official or other person (4 Words and Phrases, Perm. Ed., 771-777; 10 Words and Phrases, Perm. Ed. 44 and 45). Webster defines the word "attest" as meaning "to bear witness to; to certify; to affirm to be genuine; an act of witnessing." The word "countersign" has been defined as "to sign, in addition to the signature of another, in order to attest the authenticity; to sign or mark for authenticity; to sign or mark for authentication;" also, as a "signature of secretary or other person to a writing already signed by another, to attest its authenticity." The attesting of the signature of the governor on official documents by the secretary of state is for the purpose of authenticating the said signature of the governor for the purpose of the public records involved; to vouch for the authenticity of the governor's signature; to authenticate the document, signed by the governor, as that of the governor. Without such attestation, or countersigning, any attempt to introduce the unattested or uncountersigned document in evidence, in connection with litigation, might require proof of the signature being that of the governor before its introduction into evidence, or even a certified copy of such document.

Section 15.01, F. S., provides in part that:

... The Governor, *before issuing* any order or transmission of any official letter, communication or document from the executive office or promulgation of any official act or proceeding (except military orders) shall *deliver* the same or a copy thereof to the secretary of state *to be recorded*. (Emphasis supplied.)

This statute appears to be within the purview and intention of the above-mentioned provisions of the State Const., and valid. The statute clearly contemplates the recording by the secretary of state of

the documents, letters and communications mentioned in said §15.01, F. S., and appears to contemplate that such orders, letters, communications, documents and other things mentioned in said section, or copies thereof as the case may be, be delivered to the secretary of state for recording prior to the issuance thereof. Failure to comply with the requirements of said §15.01 may well subject such orders, letters, communications, documents, etc., to question, as to validity in any litigation that might arise in connection therewith. Said §15.01 requires that the governor before issuing such orders, letters, communications, etc., shall deliver the same, or a copy thereof, to the secretary of state to be recorded. This poses the question of the sufficiency and validity of such orders, letters, communications, etc., unless and until the same are delivered to the secretary of state and are by him recorded in the official records of office of secretary of state.

Section 14, Art. IV, State Const., makes specific reference to grants and commissions, requiring that they be signed by the governor and countersigned by the secretary of state; however, this section should not be construed as dispensing with attestations of the above-mentioned orders, letters, communications, etc., of the governor, by the secretary of state, according to the long-standing practice among the several states of the United States, as well as in the English government or governments, for the purpose of authenticating such orders, letters, communications, etc., and permitting the recording of the same, in accordance with the Florida Statutes and Constitution.

Question 2 relates to the right of members of the public to see and examine executive orders of the governor assigning state attorneys and prosecuting officers, to circuits, districts or counties other than that to which officially assigned by the statutes and laws; executive orders assigning state attorneys of one judicial circuit to service in another judicial circuit; orders assigning a county solicitor from his home county to service in another county, as well as the right of the public to see and examine the information and documents gathered or collected in connection with their investigations. Such right of inspection is subject to a number of limitations and there is no right of inspection when a disclosure of the information sought would or might be detrimental to the public interest. In *Lee v. Beach Publishing Co.*, 127 Fla. 600, 173 So. 440, text 442, the Sup. Ct. of Fla. cited, with approval, from §3 R.C.L. 161, as follows:

The right of inspection does not extend to all public records or documents, for public policy demands that some of them, although of a public nature, must be kept secret and free from common inspection, such for example as diplomatic correspondence and letters and despatches [sic] in the detective police service or otherwise relating to the apprehension and prosecution of criminals.

(See also, 45 Am. Jur. 433 and 434, §26; 76 C.J.S. 137-141, §36; 5 Jones on Evidence, 2nd Rev. Ed. 4198 *et seq.*, §§2201-2203). I doubt that the fact a prosecuting officer of one circuit, district or county has been assigned to like service in another circuit, district or county would have been deemed or considered as constituting a state secret not to be revealed. However, the work product of such investigation might well be a state secret or secrets that should not be available to the public. When information is obtained by a state attorney, prosecuting attorney, or other law enforcement officer, it would appear that such officer, or his superior, would be the proper officer to determine whether

the same should be treated as state secrets or not which the public is not entitled to inspect.

Questions 1 and 2 should be answered as follows:

1. Although executive orders such as suspensions and assignments of special prosecutors (presumed to be assigned regularly elected or appointed prosecuting officers) are not required to be countersigned by the secretary of state, by reason of §14, Art. IV, State Const., they being neither grants nor commissions, they must be attested by the secretary of state to entitle them to record as contemplated by §21, Art. IV, State Const.

2. Executive orders specifically relating to the assignment of state attorneys to make investigations which are required by law to be delivered to the secretary of state, to be attested by him and recorded among the records of his office, are public records available to the public generally. However, the work product of such an investigation may or may not constitute state secrets, a fact largely within the knowledge of the officer so assigned to be determined by him.

067-61—September 8, 1967

TAXATION

POWERS OF BOARDS OF COUNTY COMMISSIONERS SITTING AS BOARDS OF TAX EQUALIZATION—EXEMPTIONS FROM AD VALOREM TAXATION, ETC.

To: *Fred O. Dickinson, Jr., State Comptroller, Tallahassee*

QUESTION:

Do boards of county commissioners in this state, when sitting as boards of tax equalization, under and pursuant to §§193.25 and 193.27, F. S., have authority to hear, consider and pass on the propriety of the county tax assessor's action in allowing or disallowing applications for tax exemptions, other than homestead tax exemptions, as provided for under and by §1, Art. IX, and §16, Art. XVI, State Const., and the statutes implementing said constitutional provisions?

This question arises by reason of the applications of certain non-profit corporations and associations, including Bibletown, U. S. A., a nonprofit corporation organized and existing, evidently under the statutes and laws of Florida, as a religious and nonprofit organization, and a charitable organization known as Sal Haven, a low rent retirement village, evidently designed for use by retired members of a trade union or unions. In addition to the question of the right of such non-profit organizations to tax exemption from ad valorem taxation, it appears that the question arises of the jurisdiction and authority of the board of county commissioners, when sitting as a board of tax equalization under §§193.25 and 193.27, F. S., to review the action of the county tax assessor in considering said applications for tax exemption and passing upon the correctness or incorrectness of the action taken by the tax assessor in denying or in allowing such tax exemptions. Although the applicable statutes do not spell out in detail the actions to be taken by a board of county commissioners, sitting as a board of tax equalization, in considering and passing upon the correctness of the said assessments and assessed values, said statutes do authorize the board of county commissioners to hear complaints and receive testimony as to the value of the property, real or personal, as fixed by the county assessor of taxes, "of perfecting, reviewing and equalizing

the assessment." Section 193.27, F. S., provides that when making such equalization of taxes the board of equalization "may raise or lower the value fixed by the county assessor of taxes on any particular piece of real estate, or item or items of personal property."

In order to determine and fix the value of a parcel of real property for the purposes of taxation, it becomes necessary that the assessor of taxes determine the extent of the tax exemptions it may be entitled to in order to determine taxable value thereof. The determination of the valuation of the exemption becomes a necessity in the fixing of the valuation of such property for purposes of ad valorem taxation. Likewise, it becomes necessary that the tax assessor determine the right of the taxpayer to the tax exemption claimed by him. If there be no right to tax exemption there can be no reduction in valuation by reason of the said claim for tax exemption. The right to tax exemption, or the right to no tax exemption, on the part of the taxpayer, becomes material when determining the taxable value of the property of a taxpayer.

From these observations it is clear that an assessor of taxes, when determining the taxable valuation of real property, must of necessity first determine whether a taxpayer is entitled to the tax exemption claimed by him, and, if so, the nontaxable value of such exempt property, before he may fix the taxable value of the said property, unless the entire property, as well as its entire value, is entitled to tax exemption. Unless the Bibletown, U. S. A., and Sal Haven properties are entitled to an entire tax exemption, it becomes the duty of the tax assessor to fix the full market value of such properties, as well as the full market value of the exempt properties, if any, entitled to tax exemption, before he can determine the portion or portions of the said properties subject to ad valorem taxation. If the correctness of the tax assessor's valuation is put in issue before the county board of tax equalization, then it becomes necessary that the board of county commissioners, sitting as a board of tax equalization, make the same determinations in order to pass on the correctness of the tax assessor's tax valuations.

The provisions in §192.06, F. S., for exemption from taxation of educational, literary, benevolent, fraternal, charitable and scientific institutions, as well as all other institutions mentioned in said §192.06 are subject to the limitations contained in §1, Art. IX, and §16, Art. XVI, State Const. These sections of the Constitution, being limitations upon the legislature, permit tax exemption only for such real property as is held and used for municipal, educational, literary, scientific, religious or charitable purposes, and for no other purposes.

Section 1, Art. IX, and §16, Art. XVI, State Const., place a limitation "upon the power of the legislature to provide for the exemption from taxation of any classes of property except those particularly mentioned classes specified in the organic law itself," that is, the above-mentioned purposes in §1, Art. IX, and §16, Art. XVI, State Const. The tax exemptions provided for in §192.06, F. S., must be construed so as to make effective the limitations contained in §1, Art. IX, and §16, Art. XVI, State Const. Under these constitutional and statutory provisions, ownership and utilization of property are the criteria for determining its exemption from taxation. Ownership alone is not sufficient; there must also be utilization for one or more of the purposes mentioned in §1, Art. IX, and §16, Art. XVI, State Const. (*Riverside Academy v. Watkins*, 155 Fla. 283, 19 So.2d 870, text 871; *State v. Doss*, 146 Fla. 752, 2 So.2d 303, text 304; *State v. St. Johns*, 143 Fla. 544, 197 So.

131, text 134; *Lummus v. Adirondack School*, 123 Fla. 810, 168 So. 232, text 238; *University Club v. Lanier*, 119 Fla. 146, 161 So. 78, text 79). The fact that property may be owned and held by a religious, scientific, municipal, educational, literary or charitable corporation or institution is not sufficient to entitle such property to exemption from taxation.

"It is only property that is held and used *exclusively* for religious, scientific, municipal, educational, literary or charitable purposes which may be exempt from taxation under the constitution." (*University Club v. Lanier*, *supra*.) (Emphasis supplied.) "It is the property and not the corporate entity which is exempt." (*Lummus v. Florida Adirondack School*, *supra*.) "It is not the corporate character that determines the exemption but the use of the property upon which the exemption is claimed." (*State v. Doss*, 146 Fla. 752, 2 So.2d 303, text 304.)

The question stated in the first part of the opinion is answered in the affirmative. The question of whether a property owner is or is not entitled to tax exemption goes to the taxable value of such property. If the exemption be denied, the tax valuation will be higher but, if allowed, the tax valuation will be lower. The question is one going to the taxable valuation of the property of the taxpayer. A person claiming a right to tax exemption has the burden of showing that he is entitled to such tax exemption. (*Genesee Corp. v. Owens*, 155 Fla. 502, 20 So.2d 656; *Armstrong v. City of Tampa*, Fla., App., 112 So.2d 293, text 298; *Palethorpe v. Thomson*, Fla., 171 So.2d 526, text 532). See also *Stiles v. Brown*, Fla., 182 So.2d 612, text 614 and 615, dealing with a similar question.

067-62—September 8, 1967

TAXATION

REDEMPTION OF TAX CERTIFICATE BY ONE OF SEVERAL HEIRS

To: *Jess Mathas, Clerk of Circuit Court, DeLand*

QUESTION:

When a tax certificate is issued and the same covers property owned by several heirs, may one of the heirs redeem the tax certificate as to the interest of heir, said interest being an undivided one-half interest?

Your question is answered in the affirmative. In considering said question I have examined the provisions of §§194.02, 194.05, 194.06 and 194.13, F. S. Attorney General's Opinion 063-43 and the cases of *State ex rel. St. Andrews Bay Lumber Co. v. Hunter* (Florida, 1932) 139 So. 138, *State ex rel. Peninsula Distributing Corp. v. Culbreath* (Fla. 1934, rehearing 1935), 160 So. 3; and *Green Cove Farms Inc. v. Ivy, et al.*, (Fla., 1934, rehearing 1935) 161 So. 56, have also been considered. In AGO 063-43, Biennial Report of the Attorney General 1963-1964, it is stated:

1. Where a parcel of real property, owned and held by two or more owners as tenants in common or in joint tenancy, is assessed as one assessment against said tenants, less than all may, under the statutes and laws of this state, redeem such assessment as to their individual interests without paying the assessment in full. In such cases it becomes the duty of the tax assessor to determine and fix the assessed value of each said undivided interest. When such an undivided interest is so

redeemed the tax obligation will continue as to the interests not so redeemed. Should a tax sale certificate be issued after such redemption the certificate should be issued as incumbering the remaining undivided interests; if issued before redemption a notation should be made on the tax sale certificate evidencing such redemption.

2. Under normal circumstances where a parcel of real property is owned and held by two or more persons as tenants in common, such property should be assessed as a unit naming all such tenants as owners; however, the tax assessor, where circumstances may demand, may assess such undivided interests or any of them separately.

The cases referred to deal with situations where large blocks or sections of real property have been sold for nonpayment of taxes and where the party with the right to redeem is seeking to redeem only a part of the total parcel covered by the redemption certificate. These cases held that the redemption is allowable where the parcel of real property is capable of being subdivided by some usual and legal method of subdivision. The Green Cove Farms case points out that it was dealing with the subject of a redemption of a part of a parcel of real property. This redemption sought was on an area basis. In this respect see §194.06, F. S. Also see §194.05, F. S., if state-owned certificates of 1917 and prior years are involved.

However, §194.13, F. S., provides for redemption of a portion of land or interest therein contained in a tax sales certificate or certificates held by the state or by any person other than the state on the basis of value, as opposed to the basis of area.

Thus these sections of the Florida Statutes seem to encompass two different types of redemptions. One is that where the redemption is sought on the basis of area and the other is that where the redemption is sought on the basis of value. This information appears to answer the question which you have posed.

067-63—September 11, 1967

JURORS AND WITNESSES

CONSTRUCTION OF §§40.24 AND 90.14, F. S., INsofar AS THEY RELATE TO MILEAGE FOR JURORS AND WITNESSES

To: *Arthur L. Steed, State Attorney, Orlando*

QUESTIONS:

1. Are jurors, summoned under §40.24, F. S., entitled to mileage from their homes to the place where the jury meets and return to their homes for each day they are in attendance when sitting for more than 1 day?

2. Are witnesses, summoned under §90.14, F. S., entitled to mileage from their homes to the place where they give testimony and return to their homes for each day they are in attendance when they are required to be in attendance for more than 1 day?

Section 40.24, F. S., after providing for the per diem compensation of jurors for most courts, contains the provision that:

... In addition to the compensation above provided [per diem], all jurors shall receive five cents per mile for every mile

necessarily traveled in going to and returning from court by the nearest practicable route. . . .

This language was derived from §1, Ch. 28247, Laws of Florida, 1953. Identical language was used in §1, Ch. 26868, Laws of Florida, 1951; in §40.24, F. S., of the revision made by the attorney general under and pursuant to Ch. 19140, Laws of Florida, 1939, which was adopted as the F. S., 1941; in §2788, R.G.S., 1920, which language appears to have been derived from Ch. 6219, 1911; in §1, Ch. 5900, 1909; §1, Ch. 5647, 1907; §1, Ch. 4385, 1895; §1, Ch. 3853, 1889, providing a mileage of "ten cents a mile for going and returning by the nearest practicable route." There is no real or legal distinction between any of the above-mentioned statutory provisions. There has been no material change in the language of the above-quoted portion of §40.24, F. S., since said Ch. 3853, 1889, and Ch. 4385, 1895.

In AGO 058-149, of April 28, 1958 (1957-1958 AGO p. 670) Attorney General Richard W. Ervin stated that:

Prior attorney general opinions of my predecessors in office, holding that what is now §40.24, F. S., contemplates mileage to be paid to petit jurors for one complete round trip during jury service, have been construed by the comptroller as limiting the mileage payment to grand jurors to one round trip during each grand jury session. (Attorney General Fred Davis' Opinion dated May 6, 1930 [1929-1930 AGO 308] and Attorney General Tom Watson's Opinion 046-513 [Dec. 16, 1946]).

Attorney General Landis, in his opinion of Oct. 8, 1931 (1931-1932 AGO p. 480), appears to have adopted the same rule, except when the jury is not discharged over the weekend, but is required to return for services for the following week, that the jurors are entitled to be compensated for 1 round trip for that week.

It is provided in and by §90.14, F. S., as amended by Ch. 67-401, Laws of Florida, that:

. . . Witnesses in all cases, civil and criminal, in all courts, now or hereafter created, and witnesses summoned before any referee, arbitrator or master in chancery, shall receive for each day's actual attendance five dollars and also six cents per mile for actual distance traveled to and from the courts.

The courts have usually held the distance traveled under the mentioned circumstances to be the most direct and practicable route between the witness's home and the place where testimony is to be given. The witness fee prior to the 1967 amendment was \$3 per day and 5¢ per mile.

The statement was made in AGO 046-513, of Dec. 16, 1946, that it was the standing practice in this state to construe said §90.14, F. S., as permitting mileage to and return from court, or other place where testimony is taken, for only 1 round trip and not to allow such mileage for each day when the witness returns home each day and returns to court the next day. This was the construction followed by the attorney general in the said opinion of Dec. 16, 1946. This opinion was followed in AGO 061-93, of June 6, 1961. It appears from 97 C.J.S. 432-434, §13, that this may be the general rule except in those cases where the statutes expressly provide otherwise. However, with the variation in most states that where there is a recess (other than an overnight recess) with the court reconvening on another day, mileage may be paid for 1 round trip for each week in which the court is in session,

but not for each successive day. In some cases the mileage appears to have been paid for each such day, provided it did not exceed the per diem, in lieu of per diem.

There is a long standing construction of said §§40.24 and 90.14, F. S., as providing mileage compensation for only 1 round trip for each session of the grand jury or court, except in those cases where jurors are required to return on the following, or a subsequent, week. This construction is of long standing, and the legislature has not seen fit to change it by amendment or otherwise, so that it has acquired the status of a contemporaneous, administrative construction, not clearly erroneous or unreasonable and not in apparent conflict with any provision of law. Therefore, this construction should be given great weight and not be overturned except for the most cogent reasons.

The above-stated questions are answered in the negative for the reasons stated and the long-standing practice and construction by the officers charged with the administration of the said sections.

067-64—September 11, 1967

PUBLIC FUNDS IN STATE TREASURY

1967-1969 GENERAL APPROPRIATIONS—CONSTRUCTION OF §4, ART. IX, STATE CONST.—OFFICERS, BOARDS AND AGENCIES LACKING SPECIFIC APPROPRIATION

To: *Claude R. Kirk, Jr., Governor, Tallahassee*

QUESTIONS:

1. What is the legal status of the several state agencies or divisions for which no funds were appropriated for the fiscal years 1967-1969?

2. Can the governor, by proclamation or other means, designate or permit other agencies or personnel under the jurisdiction or direction of the governor to perform the lawful duties and functions of such agencies or divisions for which no funds were appropriated?

3. In the name of which agency or official should any licensing or regulatory functions be performed if such agencies had no funds appropriated and the governor designated some other agency, under his direction, to perform the functions for such agencies or divisions?

My examination of Chs. 67-300, 67-301 and 67-302, Laws of Florida, (1967 General Appropriations Acts) reveals no appropriation therein, either from the general revenue fund or from a trust fund, for the operation of the Florida Milk Commission during the annual periods beginning July 1, 1967 and July 1, 1968. Neither do I find in said appropriation act an appropriation, either from the general revenue fund or a trust fund, for the nuclear and space commission. I find in Item 350a., §1, Ch. 67-300, an appropriation of a "lump sum for activities formerly performed by the Railroad Assessment Board" in the amount of \$43,000 for each fiscal year beginning on July 1, 1967 and on July 1, 1968, said appropriations being made to the comptroller's office from the general revenue fund, but no appropriation directly to the railroad assessment board. Items 7-11, §1, Ch. 67-301, made appropriations totaling \$36,064 for the fiscal year beginning July 1, 1967, and \$36,775 for the fiscal year beginning July 1, 1968, to the aviation division of the board of commissioners of state institutions; however, these appropria-

tions appear to have been vetoed, so that they are not now available for the purposes for which appropriated.

Section 501.09(4), F. S., appears to impose a tax in the amount of fifteen one-hundredths of one cent upon each gallon of milk distributed, which tax moneys, when collected, are required to be paid into the state treasury, and are "appropriated for the administration" of Ch. 501, F. S., and constitute a trust fund in the state treasury for that purpose, "unless the legislature provides otherwise in the biennial appropriations act." I find no appropriation for such purpose in either Chs. 67-300, 67-301 or 67-302, Laws of Florida, being the 1967 General Appropriations Acts. There appears to be an appropriation under said §501.09, for the operation of the milk commission, provided, however, that funds are available in said trust fund.

You mention the Florida Nuclear and Space Commission in your letter of Aug. 22, 1967, for which no appropriation appears to have been made in either Chs. 67-300, 67-301 or 67-302, Laws of Florida, from either the general revenue fund or a trust or other fund. This agency appears to have been created and established by Ch. 57-178, Laws of Florida, which act appears to have been amended by Chs. 61-262 and 63-474, Laws of Florida. At the time of its establishment this commission was composed of 9 members appointed by the governor, as will more fully appear by reference to §290.02, F. S. Unless there be a trust fund from which the expenses of the Florida Nuclear and Space Commission may pay its costs and expenses of operation, we entertain grave doubt that it has funds available to it for the payment of its own costs and expenses. This seems to leave the Florida Nuclear and Space Commission without funds from which to pay its expenses and operation costs and expenses. I note the provision in §290.06(7), F. S., for power in the Florida Nuclear and Space Commission, "To promote, in cooperation with the Florida development commission, the industrial development of Florida by attracting new industry based on nuclear science and engineering." What may be accomplished under this statutory provision, if anything, should be determined by conference by and between the said agencies.

Although I find no appropriation in either Chs. 67-300, 67-301 or 67-302, Laws of Florida, providing an appropriation for the operation of the railroad assessment board during the fiscal years beginning July 1, 1967 and July 1, 1968, I do find that Item 350a., §1, Ch. 67-300, provides appropriations of \$43,000 for each fiscal year beginning on July 1, 1967, and July 1, 1968, described as a "lump sum for activities formerly performed by the Railroad Assessment Board," for the general office of the state comptroller. This appropriation is from the general revenue fund. The language used indicates the existence of legislation, or proposed legislation, transferring the duties and obligations of the railroad assessment board to the office of state comptroller. Senate Bill 1053 and its companion bill (House Bill 1796), introduced during the 1967 Regular Session of the Legislature, had they passed, would have transferred the powers and duties of the railroad assessment board to the office of the state comptroller; however, said bills transferring such powers and duties died on the calendar when the legislature adjourned. The state comptroller is one of the members of the Florida Railroad Assessment Board. We are not inclined to hold this appropriation void, but as an appropriation for the performance of duties formerly performed by that board or the comptroller, had the transfer to the comptroller become effective.

The authority of the aviation division of the Florida Development

Commission, under §§288.03, 330.27, 330.29, 330.30, 330.31, 330.32, 330.35, F. S., relating to aviation and airports, was transferred to the board of commissioners of state institutions by Ch. 65-178, Laws of Florida, (§330.271, F. S.). However, we find in Ch. 67-300 Laws of Florida, in Items 242 and 243, appropriations from the airport operations trust fund for airport operations of \$1,500 for each of the fiscal years or 1967-1968 and 1968-1969, and \$2,500 for the 1967-1968 fiscal year, and \$1,050 for the 1968-1969 fiscal year for capital outlay. No money from the general revenue fund was appropriated.

Section 330.11, F. S., provides for the licensing of the aircraft by the aviation department of the board of commissioners of state institutions, and the collection of the fees mentioned in said section. Section 330.23, F. S., in part requires that: "... All moneys collected by the director or the board under the provisions of this chapter shall be deposited in the general revenue fund." Also, that: "... All salaries and expenses incident to the administration and enforcement of this chapter shall be paid from the general revenue fund and the director and the board shall include the estimated amounts needed ... in their legislative budget request." This statutory provision clearly contemplates an appropriation for such purpose in the general appropriations acts. There appears to be no such an appropriation for the purposes of Ch. 330, F. S., from the general revenue fund.

Section 4, Art. IX, State Const., provides that: "... No money shall be drawn from the Treasury except in pursuance of appropriations made by law."

By constitutional provision, no money is to be drawn from the (state) treasury except in pursuance of appropriations made by law. As used, the word "law" means a statute by both houses of the legislature. An appropriation made by the joint resolution of the legislature that lacks the prescribed requisites necessary to make it law is invalid. . . .

The purpose of the constitutional provision is to prevent the expenditure of public funds already in the treasury, or potentially therein, without the consent of the public given through their representatives in formal legislative acts. . . . (25 Fla. Jur. 539 and 540, §17).

The enacting clause provided for in §15, Art. III, State Const., is a prime essential to the validity of an appropriations act under the State Const. (Winter Haven v. A. M. Klemm & Sons, 132 Fla. 334, 181 So. 153; Advisory Opinion 43 Fla. 305, 31 So. 348). Unless there be a legislative appropriation therefor, money may not be paid from the state treasury.

In the light of the above and foregoing, the 3 questions are answered as follows:

1. Although a state agency or division may have a legal status under existing laws, to permit it to function and operate there must be an appropriation for its operation before it may carry out its functions. Where there are no appropriations, either general, special or specific, the said agency or division is without operating funds. For a law to constitute an appropriations act, it must contain a proper title, as required by §16, Art. III, State Const., and the enacting clause required by §15 of Art. III, and must be enacted as required by §17 of Art. III.

2. The governor may not, unless duly authorized by law, and then only to the extent authorized, designate or permit other agencies or personnel, under the jurisdiction or direction of the governor, to perform

the lawful duties and functions of such agencies or divisions for which no funds were appropriated, either by general or special or local laws.

3. Where specific state offices or agencies are authorized or directed to issue licenses, revenue or regulatory, such licenses may be legally issued by the personnel of other offices, boards, commissions, etc., because of the want of funds for operation purposes; such licenses should be issued in the name of the agency charged with the issuance thereof, although issued by the personnel of other agencies acting as agents of the licensing agency.

067-65—September 11, 1967

PUBLIC SCHOOLS

INSTRUCTIONAL PERSONNEL—CONTINUING CONTRACTS

To: *Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee*

QUESTIONS:

1. What is the earliest date on which a person may be issued a continuing contract who has not met the required examination score?

2. What is the earliest date on which the provision that a person who has held a continuing contract in a given county in Florida and who has rendered 2 years of service in a new county may be issued a continuing contract can become effective?

3a. May a teacher under any conditions receive a continuing contract without specific recommendations from the county superintendent?

b. Must this be a written recommendation?

Section 231.16(2) (a), F. S., 1965, required that as a prerequisite to the issuance of a teaching certificate the applicant therefor must have achieved a score of at least 500, or such higher minimum score as may be fixed by regulation of the state board of education, on the common examinations of the national teacher examinations, or on a comprehensive examination approved by the state board of education as at least equivalent thereto.

The introductory paragraph of §231.36, F. S., 1965, required as one of the prerequisites to the issuance of a continuing contract to a teacher that the teacher met the requirements of §231.16(2), F. S., relating to comprehensive examination and score thereon.

Chapter 67-184, Laws of Florida, enacted by the 1967 Session of the Legislature, removed from §231.16, F. S., the requirement of an examination score as a prerequisite to the issuance of a teaching certificate and removed from §231.36, F. S., the requirement of an examination score as a prerequisite to the issuance of a continuing contract to a teacher.

This act contained an effective date provision of July 1, 1967, was approved by the governor on June 12, 1967, and filed in the office of the secretary of state on June 13, 1967. This act, therefore, became effective on July 1, 1967.

Chapter 67-387, Laws of Florida, among other things amended the introductory paragraph of §231.36, F. S., to eliminate the examination score as a prerequisite for the issuance of a continuing contract, made

a specific recommendation from the county superintendent a prerequisite for the issuance of a continuing contract, authorized a county board of public instruction to issue a continuing contract to a member of the instructional staff after 2 years of employment in the county, provided such individual had previously held a continuing contract in a county of this state and provided that beginning July 1, 1968, a continuing contract may be issued to a teacher as of the beginning of the school fiscal year during which all the requirements for a continuing contract shall be met on or before Sept. 1.

Chapter 67-387, Laws of Florida, also contained an effective date of July 1, 1967. However, it became law after July 1, 1967, without the governor's approval and was filed in the office of the secretary of state on July 14, 1967. This act having become a law subsequent to the effective date expressed in the act must be interpreted as though no effective date was expressed in the act and, therefore, it would take effect 60 days from the final adjournment of the 1967 Extended Regular Session of the Legislature. The extended regular session of the legislature adjourned on July 14, 1967, and therefore, Ch. 67-387, Laws of Florida, will not take effect until Sept. 13, 1967. See AGO 067-49 of Aug. 10, 1967, and the authorities therein cited.

The introductory paragraph of §231.36, F. S., as it existed prior to the 1967 Session of the Legislature, and as amended by both the above referred to enactments of the 1967 Session of the Legislature, provides that continuing contracts shall be effective at the beginning of the school fiscal year following the completion of all requirements. This limitation will remain in effect until July 1, 1968, when, under the provisions of Ch. 67-387, Laws of Florida, a continuing contract shall be effective as of the beginning of the school fiscal year during which the requirements are met by Sept. 1.

Section 228.041, F. S., provides in part that: "... The school fiscal year shall begin on July 1 and shall end at the close of June 30 in each and every year."

Question 1 relates to the time of eligibility for a continuing contract in those cases of teachers who had, prior to July 1, 1967, met all the requirements for a continuing contract except the achievement of the examination score required by the introductory paragraph of §231.36, F. S., 1965. If, prior to midnight June 30, 1967, a teacher had not achieved the required examination score for continuing contract, such teacher would not, during the fiscal year ending June 30, 1967, have met all the requirements for a continuing contract.

By virtue of Ch. 67-184, Laws of Florida, which became effective July 1, 1967, such examination score became no longer required as a prerequisite to a continuing contract and, therefore, the teachers referred to above would be considered to have met all the requirements for a continuing contract on July 1, 1967, which was the first day of a new fiscal year and such teachers would, therefore, be entitled to a continuing contract effective as of the first day of the next fiscal year, or July 1, 1968.

Question 2 seeks a determination of the earliest date upon which a continuing contract may be granted to a teacher who has previously held a continuing contract in one county of this state and has rendered 2 years of service in a new county.

Prior to the enactment of Ch. 67-387, Laws of Florida, a continuing contract could be granted to a teacher who had met all requirements and who had completed 3 years of probationary service in the same county of the state during a period not in excess of 5 succes-

sive years. Chapter 67-387 relaxed this requirement by authorizing a county board to issue a continuing contract to a member of the instructional staff after 2 years of employment in the county, provided such individual had previously held a continuing contract in a county in this state. There are, no doubt, teachers who have previously held continuing contracts in one county of this state and who are now teaching in other counties and have taught there 2 years or more, but less than 3 years. As of the date that Ch. 67-387 takes effect, Sept. 13, 1967, these teachers will meet the requirements for a continuing contract, assuming all other requirements are met, and, therefore, will be entitled to a continuing contract effective the first day of the fiscal year following Sept. 13, 1967, which will be July 1, 1968.

Question 3a. concerns the requirement of a specific recommendation from the county superintendent as a prerequisite to the issuance of a continuing contract. This requirement was not contained in the law prior to the enactment of Ch. 67-387, Laws of Florida, and, therefore, such requirement will not be a necessary prerequisite to the issuance of a continuing contract until and after Sept. 13, 1967, when Ch. 67-387 takes effect.

Question 3b. inquires as to whether the recommendation which will be required of the county superintendent need be a written recommendation.

The recommendation should be in such form as to be a matter of record and should either be in writing or should be made at a meeting of the county school board and reflected in the minutes of such meeting.

067-66—October 5, 1967

CONSTABLES AND JUSTICES OF THE PEACE

PAYMENT OF OFFICE SPACE RENTAL FROM OFFICE FUNDS IN BUILDING OWNED BY OFFICER HIMSELF

To: *Ernest Ellison, Legislative Auditor, Tallahassee*

QUESTION:

May a justice of the peace or constable (which may be extended to small claims courts and judges) legally pay rent from office funds for office space in buildings owned by them or in which they have a financial or other interest?

Public officers have only the authority that is conferred on them by law, and may make for the government they represent only such contracts as they are authorized by law to make. Contracts made by public officers are against public policy, and unenforceable when they interfere with the unbiased discharge of their duty to the public in the exercise of their offices, or if such contracts place such public officers in positions inconsistent with their duties as such public officers, or even if such relationship has a tendency to induce them to violate that duty. Such contracts are invalid, although there may be no statute or law prohibiting them, and although there may have been no actual loss or detriment to the public, or fraudulent intent in entering into such contracts, since the rules invalidating such contracts are based on public policy. (26 Fla. Jur. 261-264, §§124-127; 43 Am. Jur. 103-109, §§294-302; 67 C.J.S. 406 and 407, §116.)

Public officers may not make contracts, in their official capacity, with themselves or become interested in contracts so made, or make

contracts which it is their official business to see faithfully performed. A public officer, or board, may not make contracts with a board, firm or corporation of which he is a member or a part. (67 C.J.S. 406 and 407, §116.) A governmental board cannot make a contract with one of its own members, nor can a public officer make a contract, affecting the public, with a firm or corporation of which he is an officer.

The statement is made in *Stubbs v. Florida State Finance Co.*, 118 Fla. 450, 159 So. 527, text 528, that:

. . . [A] public official cannot legally participate in his official capacity in the decision of a question in which he is personally and adversely interested, or as to which he is acting as the agent for another, whose interest is opposed to that of the governmental unit which the official represents, thus causing him to occupy a position where his duty as a public official is in conflict with his personal interest. . . .

See also *Lainhart v. Burr*, 49 Fla. 315, 38 So. 711, text 715, to the same effect; and *Schauer v. City of Miami Beach, Fla.*, 112 So.2d 838. Under these authorities the rental by a justice of the peace, or other officer, of property belonging to him, or property owned by a corporation of which he is an officer, or in proper cases a stockholder, to himself as such office for use as justice of the peace office, or other office for his personal use, is at least questionable, if not actually void. Sections 839.07, 839.08 and 839.09, F. S., although probably not applicable here, illustrate the purpose and intention of the common law rule hereinabove discussed and applied.

The fees of justices of the peace, as well as those of other county fee officers, are within the purview and intention of Ch. 145, F. S., so that the fees collected by him, in excess of the compensation allowed him, under and by virtue of said Ch. 145, F. S., including other applicable statutes and laws, if any, from the net income of the office, as defined in §145.021(2), F. S., become and are county excess fee funds and not income of the officer. The county is entitled to the excess of the fees of the office, that is, the income of the office less the fees of the officer and other legal expenditures for the operation of the office. The expense of office space for a justice of the peace, or other officer, would appear to be a legitimate charge against the income of the office; however, this expense must be a legitimate expense. Where the justice of the peace, or other officer, rents such office space from himself, or from a corporation in which he is or was an officer or stockholder, the question of the validity of the rental agreement arises. On its face such an arrangement appears to be invalid, in the light of the above-mentioned authorities, and the charges therefor would not be valid charges.

The sum and substance of the contracts above-mentioned (contracts by and between disqualified persons) is that they represent real property rental contracts relating to office space, which for technical grounds are deemed illegal under the law, which have been carried out by the landowner, although unenforceable in law. The public officer in question, whose rental contracts are invalid by reason of his connection with the properties rented, has received the use and benefit of the leased properties, and the owners of the properties have received rental payments, under the unauthorized contracts, with the officer-lessee having received the use of the properties during the rental periods.

These facts and circumstances raise the question of implied contracts (to pay rent for the use of the properties), by and between the

parties thereto. "*Implied contracts* are classified as contracts implied in fact and contracts implied in law; more correctly contracts implied in fact and quasi or constructive contracts." (Emphasis supplied.) Such contracts do not arise contrary to the express declaration by the parties, but are contracts existing regardless of assent. No such contract may be implied where an enforceable contract between the parties exists. Such contracts are fictions of the law created on principles of unjust enrichment and presumption of performance of duty, without regard to assent of the parties. (17 C.J.S. 554-576, §§4, 5 and 6.)

At common law implied promises were enforceable in general assumpsit (7 C.J.S. 113-118, §9) where actionable damages existed. "Assumpsit will lie upon a promise implied in fact arising from circumstances and the intent of the parties." The term quantum meruit literally means as much as deserved, as much as is reasonably deserved, what it merits, the actual value of services performed, and no more. The term quantum valebant means as much as they are worth. These common pleadings and proceedings probably have been replaced by our current rules of proceedings adopted by the Supreme Court of Florida.

I doubt the validity of rental contracts made and entered into by and between a justice of the peace as such and the same person as landowner, or a corporation of which such justice of the peace has control and the justice himself as lessee. However, I feel that such justice of the peace, as owner of such property, or his corporation as owner, would doubtless be entitled to compensation for the use of such property on the basis of either quantum meruit or quantum valebant, for use and occupation under §83.07, F. S., which should be determined by disinterested parties. The board of county commissioners would have an interest in such rental moneys in that they would be entitled to any excess fees arising from such rental compensation. This procedure is suggested here only because of the circumstances here arising. I do not suggest the said procedure for fixing or determining current rentals.

Your question is answered in the negative, subject however, to the above and foregoing comments.

067-67—October 11, 1967

BOARD OF TRANSPORTATION

SALARY OF DIRECTOR OF TRANSPORTATION—HOW DETERMINED—§12, CH. 67-240, LAWS OF FLORIDA

To: *Claude R. Kirk, Jr., Governor, Tallahassee*

QUESTIONS:

1. What is the salary of the Director of the Department of Transportation created by Ch. 67-240, Laws of Florida (Part III, Ch. 23, F. S.)?
2. Can section 12 of said Ch. 67-240, Laws of Florida, be construed to mean that state and county departments, authorities, and commissions furnish financial aid to the Department of Transportation?

There was established by Ch. 67-240, Laws of Florida, (§§23.041-23.054, F. S.) in the executive department of the state, a transportation commission, consisting of the governor, secretary of state, attorney general, state treasurer, superintendent of public instruction, commis-

sioner of agriculture and state comptroller and of which "the Governor shall serve as Chairman." The said commission is referred to in Section 8, Ch. 67-240, (§23.048) as "department of transportation." In addition to the transportation commission, there is also established by Section 6, Ch. 67-240, (§23.046) a transportation authority consisting of the chairman of the public service commission, the chairman of the state road board, and the director of transportation, the first two being ex officio members. It is provided in Section 9, Ch. 67-240, (§23.049) that: "The director shall receive the same salary as the chairman of the state road board." Chapter 67-240 became a law on June 26, 1967, became effective on Oct. 1, 1967, and was derived from House Bill No. 685, of the 1967 Regular Session of the Legislature, which was introduced in the legislature on April 1, 1967.

Chapter 67-461, Laws of Florida, was derived from House Bill No. 83, which was introduced into the legislature on April 4, 1967, and §334.062(3), F. S., provides that: "The State Road Board shall elect from among its membership a chairman, who shall have the duty of presiding at its meetings, and a vice-chairman, who shall serve in the absence of the chairman." This act became a law on Aug. 1, 1967, upon its approval by the governor, a date after the July 1, 1967, effective date mentioned in Section 7, Ch. 67-461. The legislature adjourned July 14, 1967, so that the act became effective 60 days from said adjournment under §18, Art. III, State Const., a date subsequent to the effective date provided in Section 7, Ch. 67-461.

The provision in Section 9, Ch. 67-240, Laws of Florida, (§23.049) that: "The Director (of Transportation) shall receive the same salary as the chairman of the state road board" is confusing when we consider new §§334.061 and 334.062, F. S., substituted in place of and in lieu of former §334.06, F. S., which differ little legally from the former section. (Parenthetical matter added.) In each case there are 5 district members, selected by the governor and confirmed by the senate. Under §334.062(3), the "... State Road Board shall elect from among its membership a chairman, who shall have the duty of presiding at its meetings ...". A like provision was contained in §334.07, F. S.

Under former §334.10, F. S., the chairman of the state road board was the executive officer of said board and, under §334.11, F. S., was charged with coordinating the highway program of the board. Like powers and duties are vested in the state road commissioner, created and established by §334.091, F. S., by §§334.10 and 334.11, F. S. The duties of the chairman, as presiding officer over the road board, and his powers as executive officer for the said board, under §§334.10 and 334.11, F. S., have been divided under the amended law between the chairman of the said board and the state road commissioner, established by Section 2 of Ch. 67-461, Laws of Florida, the executive duties of the chairman having largely been vested in the state road commissioner by Ch. 67-461, so that the former duties and obligations of the chairman of the department are now vested in two persons, that is, the chairman of the state road board and the state road commissioner.

These observations bring up the question of whether the provision, in Section 9 of Ch. 67-240, Laws of Florida, (§23.049) that, "The Director (of the Transportation Commission) shall receive the same salary as the chairman of the state road board." refers to such chairman's duties as chairman of the state road board (as presiding officer at its meetings) or as its executive officer performing the duties and obligations imposed by former §334.10, F. S. (Parenthetical matter added.)

The state road commissioner, having been appointed by the state road board with the concurrence of the governor and a majority of the state personnel board, does not appear to be an officer of the state (see §27, Art. III, State Const.) but appears to be a state employee. I am of the view that the powers and duties of the state road commissioner are more in the nature of those duties formerly exercised by the chairman of the state road board as executive officer for the state road board, and not those exercised as chairman presiding over road board meetings.

The provision in Section 9, Ch. 67-240, Laws of Florida, (§23.049) that, "The director shall receive the same salary as the chairman of the state road board." appears to be a reference to §334.09, F. S., 1965, which provided that, "The chairman (of the state road board) shall receive an annual salary of seventeen thousand, five hundred dollars." (Parenthetical matter added.) However, §334.09 was repealed by Section 2, Ch. 67-461, Laws of Florida, and new §334.091, F. S., was substituted in lieu thereof, which substituted section fixes no compensation for the said chairman of the state road department; neither does Ch. 67-461. The repeal of §334.09 was Sept. 13, 1967, a date prior to the effective date of Ch. 67-240, that is, Oct. 1, 1967.

The application of the salary provided for the chairman of the state road department, by former §334.09, F. S., which has been repealed (that is, seventeen thousand, five hundred dollars per annum) is very doubtful. The position of director of transportation differs materially from that of the state road commissioner, provided for by Ch. 67-461, Laws of Florida, as the position of the present chairman of the state road department differs from that of the former chairman of said department, and each differs materially from that intended by Section 9, Ch. 67-240, Laws of Florida, which leads me to the conclusion that existing statutes do not fix a salary for the director of transportation.

It is my suggestion that the question of the salary of the director of transportation be taken up with the State Planning and Budget Commission, with the view of fixing a salary for the said director of transportation, payable out of any funds available for such purpose.

Section 12, Ch. 67-240, Laws of Florida, (§23.052) provides that:

... All departments, divisions, boards, authorities and commissions of the state or any political subdivisions are authorized and directed to provide such assistance and data to the department of transportation as will enable it to carry out its functions, powers and duties.

You seek a construction of this section and whether or not it includes financial aid from such departments, divisions, boards, authorities, and commissions of the state or political subdivisions. Doubtless the legislature had in mind the furnishing of data and information in their hands that might be of assistance to the department of transportation in compiling data and information necessary for such department's duties which have already been compiled by others and which are useful to the said department of transportation. As to financial assistance, funds available to departments, divisions, boards, authorities, and commissions of the state have been appropriated for particular purposes and are limited to use for such purposes, under §4, Art. IX, State Const. Such appropriated funds may not be used for purposes other than that for which appropriated. Chapter 129, F. S., establishes a system of annual budgets for county commissioners, which budgets have the force and effect of appropriations and counties

should conform to them. Any use of such county funds has to be in conformity with such budgets. Should such state and county agencies desire to provide financial aid under Section 12, Ch. 67-240, Laws of Florida, (§23.052) to the transportation commission, such funds must be used so as to come within their legislative appropriations, or county budgets, and for the purposes therein mentioned. Such funds may not be diverted from the purposes and intention of such state appropriations and county budgets.

067-68—October 24, 1967

REGULATION OF TRAFFIC ON HIGHWAYS

USE OF DIRECTIONAL TURN SIGNALS ON A MOTOR VEHICLE—WHEN PASSING ANOTHER MOTOR VEHICLE—CH. 67-64, LAWS OF FLORIDA

To: H. N. Kirkman, Director, Department of Public Safety, Tallahassee

QUESTION:

Is the use of directional turn signals on motor vehicles while passing or changing lanes prohibited?

The 1967 Session of the Legislature enacted Ch. 67-64, Laws of Florida, repealing §317.291(3), F. S., which read as follows:

... The driver of any vehicle overtaking or passing any other vehicle or changing lanes or course shall prior to such overtaking, passing, or changing, give the appropriate signal as may be required by law, provided however that the giving of such signal shall not give the signaling driver any right of way. His actions shall remain subject to the provision of subsections (1) and (2).

and amended §317.371(4), F. S., by deleting the following italicized words:

... The signals provided for in §317.381 shall be used to indicate an intention to turn, *change lanes or start from a parked position* and shall not, except as provided in §317.902 be flashed on one side only on a parked or disabled vehicle, or flashed as a courtesy or "do pass" signal to operators of other vehicles approaching from the rear.

(This deleted provision first appeared in Florida Statutes by virtue of Ch. 63-175, Laws of Florida.)

The cardinal paramount rule of statutory construction is to ascertain and give effect to legislative intent. 30 Fla. Jur., Statutes, §73, and cases collected therein.

There does not appear to be any doubt that it was the legislative intent in repealing §317.291(3), F. S., and amending §317.371, F. S., to delete any reference to the mandatory use of directional turn signs and signals for change of lanes or starting from a parked position. Therefore, by the elimination of "change lanes or start from a parked position" and the repealing of §317.291(3), the legislature has made the use of directional signals that may be given by arm and hand or flashing lights optional when a driver of a motor vehicle is changing lanes or starting from a parked position.

The doubt that may have precipitated your question appears to

be raised when the provisions of §317.902(5), F. S., are read in pari materia with the provisions as they presently exist in §317.371(4), F. S. The provisions of §317.902(5), F. S., 1965, read as follows:

Flashing lights are hereby prohibited on vehicles except as a means of indicating a right or left turn or to indicate said vehicle is lawfully stopped or disabled upon the highway.

Section 317.902, F. S., is primarily an equipment section which assigns red, blue and amber lights to specified designated motor vehicles and governmental agencies. The primary purpose of the provisions of subsection (5) is to prohibit the use of flashing lights on all motor vehicles except police, firemen, authorized emergency vehicles or rural mail carriers and those vehicles that are indicating a right or left turn or to indicate said vehicle is lawfully stopped or disabled upon the highway.

The law favors a rational and sensible construction of statutes and they must be so construed as to avoid absurd results. *State Department of Public Welfare v. Bland*, 66 So.2d 59; *Johnson v. State*, 91 So.2d 185; *Sharon v. State*, 156 So.2d 677.

In the case of *Pinellas County v. Woolley*, 189 So.2d 217, the court at p. 219 said:

... Two of the fundamental rules of statutory construction are that courts should construe a statute so that the plain intent of the Legislature is given effect and that courts should not construe a statute in such a manner as to reach an absurd conclusion if any other construction is possible. . . .

The primary purpose of directional signals, whether by arm and hand or mechanical flashing lights, is to warn not only drivers in the rear but also to warn any and all vehicles that may be reasonably affected by the movement of the signaling car. However, the mere giving of any directional turn signal does not in and of itself give the right-of-way to the signaling vehicle. Regardless of whether a turn signal is or is not required, self-preservation would dictate that no person should turn a vehicle from any direct course or move right or left upon the highway until such movement can be made with reasonable safety.

Mechanical directional turning devices, primarily flashing lights, came into widespread use subsequent to World War II and their use is accepted in lieu of the arm-hand signals in all of our sister states. In fact, I am unaware of any major automobile manufacturer in the world that produces automobiles for the current market that does not equip the automobile with mechanical turning indicators as standard equipment.

The ever-increasing widespread slaughter upon our public highways as a result of automobile accidents would appear to require that every precaution should be taken and made in order that our highways become safer places upon which to travel.

Therefore, a careful study and analysis of the provisions of §317.371(4) and §317.902(5), F. S., does not reveal that there is any positive inconsistency or repugnance in their practical effect and consequence and a rational and sensible construction would indicate that it was the legislative intent to permit motorists to use flashing directional turn lights to indicate an intention to change lanes. Your question is answered in the negative.

067-69—October 25, 1967

CLERKS OF CIRCUIT COURT—FEES

WITNESS FEES FOR LAW ENFORCEMENT OFFICERS, OTHER
PUBLIC EMPLOYEES AND CITIZENS GENERALLY

To: *Arthur H. Beckwith, Jr., President, State Association of Court
Clerks, Sanford*

QUESTIONS:

1. Are law enforcement officers entitled to witness fees or per diem and mileage for appearing as official witnesses at hearings in courts of this state in connection with matters growing out of their official duties?

2. Does the fact that the officer may be testifying during his normal duty hours affect his entitlement to witness fees or per diem and mileage?

3. Is a municipal police officer entitled to the same fees and reimbursement for expenses as state and county law enforcement officers?

4. Are state, county and municipal law enforcement officers entitled to witness fees and reimbursement for travel expenses for appearances before grand juries, testimony given before a state attorney, county solicitor, and other prosecuting attorneys authorized to file informations?

5. When a law enforcement officer testifies as a witness in connection with his official duties what agency is responsible for reimbursing him?

6. Are other state, county or municipal employees entitled to the same witness fees and reimbursement for expenses as law enforcement officers?

7. Where a witness, who is not a public employee, must appear at a hearing for several consecutive days is he entitled to reimbursement for more than one round trip from his official headquarters if such travel is actually performed?

Section 90.14, F. S., as amended by Ch. 67-401, Laws of Florida, and §90.141, F. S., as amended by Ch. 67-427, Laws of Florida, appear to contain the fundamental statutory law relative to the questions set out above and these sections now provide:

90.14 Witnesses; pay.—Witnesses in all cases, civil and criminal, in all courts, now or hereafter created, and witnesses summoned before any referee, arbitrator or master in chancery shall receive for each day's actual attendance five dollars and also six cents per mile for actual distance traveled to and from the courts.

90.141 Law enforcement officers; per diem, expenses; witnesses, pay.—Any law enforcement officer of any municipality, county or the state who shall appear as an official witness to testify at any hearing or law action in any court of this state as a direct result of his employment as a law enforcement officer shall be entitled to per diem and traveling expenses at the same rate provided for state employees under §112.061. In addition thereto, such officer shall be entitled to receive the daily witness pay, exclusive of the mileage allowance, as pro-

vided by §90.14, except when such officer is appearing as a witness during time compensated as a part of his normal duties.

Section 2, Ch. 67-427, Laws of Florida, repeals §902.19(4), F. S., which denied witness fees and mileage to deputy sheriffs, sheriffs and constables.

AS TO QUESTION 1:

Section 90.141, F. S., quoted above, authorizes all law enforcement officers except highway patrol officers governed by §321.05, F. S., to be reimbursed for necessary travel and per diem expenses authorized by §112.061, F. S., when appearing as an official witness at any hearing or court proceeding in this state when his appearance is a direct result of his employment. The entitlement to travel and per diem reimbursement is, however, conditioned upon travel away from the officer's official headquarters as defined in §112.061(4), F. S. See AGO 063-114, p. 172 of the 1963-1964 Biennial Report of the Attorney General. Said officers are not entitled to daily witness fees in addition to per diem and mileage when the officer testifies at a time considered to be part of his normal duty hours. Question 1 is answered in the affirmative.

AS TO QUESTION 2:

As explained above, a law enforcement officer, except highway patrolmen, testifying during normal duty hours at any hearing or court proceeding in this state when his appearance is a direct result of his employment, is entitled to reimbursement for travel and per diem expenses but not witness fees. On the other hand, if the officer testifies at a time other than during normal duty hours then he shall be entitled to receive statutory witness fees exclusive of mileage authorized by §90.14, F. S., plus reimbursement for travel and per diem expenses to which he might be entitled under the provisions of §112.061, F. S. Question 2 as set out above is answered in the affirmative.

AS TO QUESTION 3:

The present amendments to §§90.14 and 90.141, F. S., which repealed §902.19(4), F. S., have equal application to municipal police officers and all law enforcement officers, except highway patrolmen, appearing at any hearing or law action in any court of this state or appearing before any grand jury, state attorney, county solicitor, or other prosecuting officer authorized to file information. Accordingly, municipal police officers like state and county law enforcement officers are entitled to witness fees and reimbursement for travel and per diem as authorized by §§90.14 and 90.141, F. S., as quoted above and discussed herein. Question 3 is answered in the affirmative.

AS TO QUESTION 4:

Question 4 as set out above is answered in the affirmative on the basis of the authority set out in AGO 064-69, p. 349 of the 1963-1964 Biennial Report of the Attorney General. Payment is to be made in the same manner as discussed in this opinion for appearance in court.

AS TO QUESTION 5:

Witnesses are to be compensated by the party or agency on whose behalf they are summoned. See §90.15, F. S. Under §14, Declaration of Rights, State Const., costs may not be assessed against a defendant in a criminal proceeding "except after conviction, on a final trial." Under §§939.05 and 939.06, F. S., and §9, Art. XVI, State Const.: "In all *criminal* cases prosecuted in the name of the State when the defendant is insolvent or discharged, the legal costs and expenses, including the fees of officers, shall be paid by the counties where the crime is committed. . . ." For defendant's witnesses see §939.07, F. S. (Emphasis supplied.)

Cases in municipal courts based on offenses against municipal ordinances are not criminal in nature and the payment of costs is governed by the special acts establishing the courts except that where §932.52(17), F. S., is applicable: "The costs shall be taxed by the circuit court upon the final decision of the appeal and shall be paid by the municipality if the decision on appeal is adverse to it."

In summary the county is liable for expenses of witnesses testifying in criminal cases except where a solvent defendant is convicted or in a case tried under city charter or ordinance provision in municipal court. Question 5 is answered accordingly.

AS TO QUESTION 6:

The provisions of §90.141, F. S., do not apply to public employees who are not law enforcement officers. Where such employees are called upon to testify as witnesses in the city of their official headquarters they would be entitled to the witness fees authorized under §90.14, F. S. Should they be required to testify as a direct result of their employment at a location other than their official headquarters as defined in §112.061(4), F. S., then they would have the option of claiming reimbursement under §112.061 or §90.14, F. S. Should testimony be required at a place other than the official headquarters and be unconnected with official duties, said employees would be reimbursed as other witnesses under the provisions of §90.14, F. S. Question 6 is answered accordingly.

AS TO QUESTION 7:

A witness who is not a public employee appearing for several consecutive days is entitled to receive \$5 for each day's actual attendance as a witness but he is not entitled to reimbursement for more than one round trip for actual distance traveled to and from the court or hearing unless the court by order allows his testimony to be interrupted for a day or more and permits his return home. See AGO 061-93, p. 154 of the Attorney General's Biennial Report for the years 1961-1962. Question 7 is answered in the negative.

067-70—October 25, 1967

EXECUTIVE VETO OF APPROPRIATIONS

CONSTRUCTION OF §18, ART. IV, STATE CONST.—APPLICATION TO SECTION 12, CH. 67-604, LAWS OF FLORIDA, CREATING THE INDUSTRY SERVICES BOARD

To: *Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee*

QUESTIONS:

1. May Section 12, Ch. 67-604, Laws of Florida, be classified as an item in a general appropriations act subject to separate veto by the governor.

2. If Section 12, Ch. 67-604, Laws of Florida, is an item subject to separate veto by the governor, does the veto effectively destroy and nullify the whole bill or only the vetoed portion?

Chapter 67-604, Laws of Florida, creates the industry services advisory board, provides for its composition and sets forth its powers and duties (§230.66, F. S.). Section 12 of that act reads as follows:

Vetoed [There is hereby appropriated to become a part of and to be added to the budget of the state department of education the sum of one million dollars (\$1,000,000) from the general

revenue fund for the 1967-69 biennium to carry out the provisions of this act.]

Subsequent to the passage of that act by both houses of the legislature the governor vetoed the aforesaid section 12 without attempting to veto the remaining portions of the act.

Section 18 of Art. IV, State Const. provides:

... The Governor shall have power to disapprove of any item or items of any bills making appropriations of money embracing distinct items, and the part or parts of the bill approved shall be the law, and the item or items of appropriation disapproved shall be void, unless repassed according to the rules and limitations prescribed for the passage of other bills over the Executive veto.

It will be noted that the foregoing quoted section of the constitution empowers the governor to make item vetoes in any bill making appropriations of money embracing distinct items.

Each session of the legislature passes bills making appropriations for the salaries of government officers and other current expenses as are contemplated by §30, Art. III, State Const. Both the executive and judicial departments of the government stand sponsors for calling such laws "General Appropriation Bills." See *Amos v. Moseley*, 77 So. 619, p. 623. On p. 624 of the same opinion the court held:

... There seems to be no reason why an act the general purpose of which is not to make appropriations for salaries of public officials and for current expenses of the state may not ... make provisions for the payment of expenses necessary, proper, incidental or growing out of the law itself. ...

The Supreme Court of the United States, in *Bengzon v. Secretary of Justice*, etc., 299 U.S. 410, 57 Sup. Ct. 252, 254, 81 L. Ed. 312, said: "An item of an appropriation bill obviously means an item which in itself is a specific appropriation of money."

This definition was cited with approval by the Supreme Court of Florida in *Lee v. Dowda*, 19 So.2d 570 p. 573.

It may therefore be seen that the "General Appropriation Bill" is a bill embracing distinct items as contemplated by §18, Art. IV, State Const., while a bill making provision for the payment of expenses necessary and incidental to the law itself is a bill containing but a single item of appropriation. Chapter 67-604, Laws of Florida, is a bill falling within the latter category.

Thus it appears that such a bill is not contemplated by §18, Art. IV, State Const. and, therefore, the governor would not be authorized to veto the item of appropriation without vetoing the entire act.

Consequently I am of the opinion that the governor's attempted veto of Section 12 of Ch. 67-604, Laws of Florida, was of no force or effect.

Question 1 is answered in the negative.

Question 1 having required a negative answer, question 2 becomes moot.

067-71—November 6, 1967

EXPENDITURE OF STATE FUNDS

AUTHORITY OF COMPTROLLER TO PAY VOUCHER OF DEVELOPMENT COMMISSION FOR COSTS OF GOVERNOR'S TV ADDRESS ON EDUCATION PURSUANT TO §§288.03 AND 288.15, F. S.

To: *Fred O. Dickinson, Jr., State Comptroller, Tallahassee*

QUESTION:

Is the Comptroller of Florida authorized to release state funds, upon request by the Florida Development Commission, to pay the television station or any costs or expenses incurred relative to the governor's address, "Education in Florida: Perspective for Tomorrow" presented on Sept. 5, 1967?

The Florida Development Commission, at 107 West Gaines Street, Tallahassee, Florida, by and through its attorney, Hon. Arnold L. Greenfield, by letter dated Sept. 20, 1967, submitted its Voucher No. 0104-272, dated Sept. 15, 1967, to the comptroller for the payment, from the funds of the said Florida Development Commission, of the sum of \$3,525.99, to Television Station WTVJ, of Miami, to be paid "from funds available for expenses of the said Florida Development Commission under Object Code 2900, Other Contractual Services."

It appears from Mr. Greenfield's letter of Sept. 20, 1967, as the commission's attorney, that, "The legal authority under which such expenses were incurred is Chapter 288, Florida Statutes, and particularly Sections 288.15(7) and 288.03, Florida Statutes." This was an amended voucher. Upon receipt of the original voucher, the general counsel for the comptroller requested that the comptroller's office be furnished with a copy of the contract between the television station and the Florida Development Commission. The commission furnished the comptroller with a copy of a letter, under date of Sept. 4, 1967, to the television station, stating seven items which appeared to be necessary for the production of the tape, consisting of:

- (1) Studio setup and record
- (2) Extra camera
- (3) Up to four extra video tape recorders
- (4) Two 30 minute video tapes
- (5) Audio tape dub
- (6) Set construction, props, etc.
- (7) Prompter service.

The estimate on these items of expense appears to have been around \$2,000. In addition to the above was an item of "up to \$1,700 for the necessary network facilities, so the broadcast may appear on other stations willing to make sufficient time available without cost." This letter, as a contract, was approved by the development commission's attorney, and accepted by WTVJ by Bill Brazzil.

There is attached to the file before me, which may have been attached to Mr. Greenfield's letter of Sept. 20, 1967, an advance copy of what appears to have been the "Television-Radio Address by Governor Claude R. Kirk, Jr., of September 5, 1967," on "Education in Florida: Perspective for Tomorrow." This appears to be a speech on the educational system in Florida with the governor's criticisms and

suggestions for the betterment of the Florida educational system. These observations seem to bring me to the question of whether the governor's pamphlet and speech on "Education in Florida: Perspective for Tomorrow" may be said to be such as may be expected to: "Create and build Florida industries, promote commerce and sale of Florida products, encourage employment for Florida citizens, encourage visitors from other states and countries to come to Florida, and raise the earning level of Florida citizens," and otherwise accomplish the purposes and accomplishments mentioned in §288.03, F. S., to which reference is hereby made, as well as any that may be mentioned in §288.15(7), F. S.

It does not appear from the file furnished me by the state comptroller that the Florida Development Commission has yet clearly brought Voucher No. 0104-272, of Sept. 15, 1967, within the purview and intention of said §§288.03 and 288.15, F. S., or any appropriation act heretofore enacted by the legislature. I suggest that the Florida Development Commission be permitted to bring their said Voucher No. 0104-272, of Sept. 15, 1967, within the purview and intention of said §288.03 or §288.15, F. S., or within some other applicable appropriation statute or act.

Should you, upon the submission of the above-mentioned information to you, be in doubt as to the sufficiency of such additional information you may submit the same to me for further study and advice.

067-72—November 6, 1967

CLERK OF CIRCUIT COURT

FEES FOR COPYING MISCELLANEOUS DOCUMENTS FILED WITH CLERK'S OFFICE

To: D. J. Bradshaw, County Attorney, Inverness

QUESTION:

May the clerk of the circuit court furnish copies of original instruments delivered to him for filing at an agreed price?

According to your inquiry it is contemplated that the copies would be requested and made subsequent to the filing but prior to recording by the clerk.

In *State ex rel. Harris v. Wiecking*, 65 Fla. 70, 61 So. 125, it was held that an instrument becomes a part of the public record from the time it is filed with the clerk and becomes open to the public for inspection just as though it had been spread at length upon the record books kept by the clerk.

Under the provisions of Ch. 28, F. S., there is no established fee for providing copies of filed but not recorded records. Thus, it would appear that §119.03, F. S., would be applicable. This section provides for the copying of all documents to which the public has the right of inspection and permits the lawful custodian of said records to make a charge for copying and for the services of any deputy employed in connection with the copying of the instruments. The rate of compensation may be agreed upon by the persons desiring the copies and the custodian of the records, documents or instruments. In the event that these two people fail to agree as to the charge, then the board of county commissioners may establish a fee.

In this instance it is understood that copies are to be furnished on a copying machine provided by the county commissioners and thus

it would seem appropriate to seek the acquiescence and agreement of the board of county commissioners in establishing the fees for copying said documents.

These comments appear to be consistent with the previous observations of this office found in AGO's 057-240 and 057-280, Biennial Report of the Attorney General 1957-1958.

067-73—November 13, 1967

MOTOR VEHICLES—DRIVER'S LICENSE

RESTRICTED OPERATOR LICENSE—APPLICATION OF §322.16, F. S., AS AMENDED BY CH. 67-174, LAWS OF FLORIDA

To: H. N. Kirkman, Director, Department of Public Safety, Tallahassee

QUESTION:

Is a person who obtained a restricted operator license prior to Sept. 1, 1967, required to be accompanied at all times by a licensed operator or chauffeur who is at least 21 years of age and actually occupying the front seat beside such minor?

The 1967 Florida Legislature enacted Ch. 67-174, Laws of Florida, which amended §322.16, F. S., by raising the minimum age for a restricted license from 14 years to 15 years and requiring that the restricted licensee be accompanied by a licensed driver 21 years or older occupying the front seat beside the driver. Although the governor approved this act on June 8, 1967, it did not, by its own provisions, take effect until Sept. 1, 1967.

Prior to Sept. 1, 1967, the provisions of §322.16, F. S., authorized the issuance of a restricted license to a person 14 years or older and required that the licensee be accompanied by a licensed driver 18 years or older occupying the front seat beside the driver.

It is a cardinal rule of statutory construction that in the absence of a clearly expressed legislative intent to the contrary, every statute will be construed to operate prospectively and will not be given a retrospective effect. *Cragin v. Ocean and Lake Realty Co.*, 135 So. 795, affirming 133 So. 569, followed in *Mabson v. Christ*, 134 So. 43, rehearing denied 140 So. 671, 104 Fla. 606. Appeal dismissed *Girard Trust Co. v. Ocean and Lake Realty Co.* 52 Sup. Ct. 494, 286 U.S. 523, 76 L. Ed. 1267.

Not only is there an absence of a clear legislative intent to make the provisions of Ch. 67-174, Laws of Florida, retroactive but on the contrary it clearly appears to be the legislative intent that they be prospective. This is so inasmuch as Section 1, Ch. 67-174 (§322.05(2), F. S.), specifically provides in part that ". . . Nothing in this subsection shall invalidate any license or learner's permit issued prior to September 1, 1967." (Emphasis supplied.)

It is therefore my opinion, based upon the aforesaid statute and cases, that Ch. 67-174, Laws of Florida, should be construed to operate prospectively from Sept. 1, 1967, and that those restricted licenses issued prior to Sept. 1, 1967, are governed by the terms, conditions and regulations effective at the time license was issued.

However, all restricted licenses issued subsequent to Sept. 1, 1967, are governed by the requirement that the licensee be at least 15 years

of age and accompanied, when driving, by a licensed operator or chauffeur who is not less than 21 years of age occupying the front seat beside the minor. Your question is answered in the negative.

067-74—November 20, 1967

TAXATION

AD VALOREM TAX STATUS OF LEASEHOLD INTEREST IN INDIAN LANDS

To: *Lucille Small, Tax Assessor, Hendry County, LaBelle*

QUESTION:

Are the leasehold interests of lessees of Indian Reservation lands in Hendry County subject to taxation pursuant to §192.62, F. S.?

The said lands in Hendry County, making up the Seminole Indian Reservation in Hendry County, are held by the United States, or its agency in charge of Indian affairs, in trust for the use and benefit of the Seminole tribal Indians residing thereon (27 Am. Jur. 555, §24; 42 C.J.S. 688 and 689, §26). The lands in Broward County are held in trust by the board of commissioners of state institutions, for the use and benefit of the Seminole tribal Indians residing thereon (Ch. 285, F. S.). The said lands held by the United States and by the board of commissioners of state institutions are held in trust for like purposes. The Indians are wards of the United States Government (27 Am. Jur. 545, §5; 42 C.J.S. 672, §20). Indian tribes, residing on Indian reservations, have many of the rights, powers and exemptions of sovereign political entities (42 C.J.S. 665, §11). "Until 1871, Indian tribes were recognized by the United States as possessing the attributes of nations to the extent that treaties were made with them." (27 Am. Jur. 547, §9.) Such Indian lands, whether held by the United States or Florida, whether directly or through designated agencies, are in law governmental property and entitled to immunity from taxation as lands of Indian tribes (84 C.J.S. 494, *et seq.*, §258; 51 Am. Jur. 289 and 290, §229). Neither the interest of the federal government, the state nor the Indians in the lands constituting the said Indian Reservations in Broward and Hendry Counties, is subject to taxation, by either Broward or Hendry Counties because of the sovereign character of the United States and the State of Florida, including their agencies holding title to said reservations.

This brings us to the question of whether or not the interests of the lessees in and to said lands may be assessed for taxes under and pursuant to §192.62, F. S., which section, insofar as here material, provides that:

... Any real or personal property which for any reason is exempt or immune from taxation but is being used, occupied, owned, controlled or possessed, directly or indirectly by a person, firm, corporation, partnership or other organization in connection with a profit making venture, whether such use, occupation, ownership, control or possession is by lease, loan, contract of sale, option to purchase or in any wise made available to or used by such person, firm, corporation, partnership or organization, shall be assessed and taxed to the same

extent and in the same manner as other real or personal property. . . .

under the conditions mentioned in §192.62, F. S. This statute contemplates a taxation of the leasehold interests, not the fee title to the property leased, so that the property, when subject to taxation, would be the fair market value of the leasehold interest in the lands. We presume that most if not all of such leases or like interests in the lands, will be for fixed periods of time, running by the calendar year or otherwise, including leases for a fixed number of months, weeks or days.

Leases for terms of years, months, weeks or days, however long, are chattels real, falling within the classification of personal property (51 C.J.S. 531, §26; 32 Am. Jur. 39, §16). The taxable value of such a leasehold interest would appear to be the fair market value of the leasehold interest; that is, what would a willing purchaser, who is not required to purchase, pay for the leasehold interest in question, to a willing holder of such a lease who is not required to sell the same. We deal with the market value of the leasehold interest in question, however long or short the term thereof, between persons dealing at arm's length. These observations spell out the rules for determining the value of leasehold interests generally.

Such leasehold interests in state and federal property were not subject to taxation prior to the enactment of §192.62, F. S., (*Park-N-Shop, Inc., v. Sparkman*, Fla., 99 So.2d 571; *Patrick Gardens, Inc., v. J. D. Nash*, Fla., 100 So.2d 626). If subject to taxation such property is subject to taxation under and pursuant to §192.62, F. S.; however, the fee title of the United States and of Florida, and the interest of the Seminole Tribe of Indians are immune from taxation and may not be taxed. This limits our consideration to whether or not the interests of the lessees, under the leases from the state and federal governments, may be taxed and, if so, the measure of tax valuation for taxing such interests. The interests of the state and federal government, as well as of the Indians, in and to the lands are immune from taxation; only the leasehold interests may here be considered. It has been said that governmental "immunity does not exist where no direct burden is laid on the government instrumentality, and there is only a remote, if any, influence on the exercise of the functions of government." (84 C.J.S. 393, §206).

From the above and foregoing it appears that taxation of such leasehold interests under §192.62, F. S., is not objectionable if it does not impair the usefulness and efficiency or hinder the operation of the Indian program of the federal government in Florida and does not frustrate the purpose of the said federal Indian program. The tax imposed by said section is one imposed against the lessee of the government lands, and not against the government; however, the question arises as to whether the imposition of the tax against the lessee will materially affect the income of the government from its said leases, to the detriment of its Indian program, by a reduction in the rentals received by the government. A levy of such a tax on existing leasehold interests would have no effect on the government's income from said leases, but might affect its income from future leases.

This leads to the conclusion that you may assess such leasehold interests (not the lands themselves) at 100% of the fair market value of such leasehold interests. It is provided in §192.62(2)(c), F. S., that said section has no application to properties which were leased prior to June 16, 1961, during the term for which such lease was granted;

however, this exception does not extend to renewals or extensions of such leases.

067-75—November 27, 1967

OPERATION OF MOTOR VEHICLES

INTOXICATION—CHEMICAL TESTS FOR—AUTHORITY OF MUNICIPAL POLICE OFFICERS TO PROCEED UNDER THE PROVISIONS OF CH. 67-308, LAWS OF FLORIDA (§§322.261 AND 322.262, F. S.)

To: William A. Norris, Jr., City Prosecutor, Bartow

QUESTIONS:

1. May municipal police officers utilize the provisions of Ch. 67-308, Laws of Florida, in the investigation of offenses involving driving while under the influence of alcoholic beverages, that is, does "peace officer" as used by §322.261(1)(a), F. S., contemplate municipal police officers?

2. Despite the phrase "criminal offense" in §322.261(1)(d), F. S., does the municipal court have jurisdiction to conduct the hearing therein required?

3. In §322.261(1)(g), F. S., who must bear the cost of the test therein required, and is there any conflict between the provisions of §§322.261(1)(g) and 322.261(2)(c), F. S.?

4. Does §322.262(1), F. S., supersede or complement §186.0177, F. S., and if the section complements §186.0177, may a municipality with an ordinance making state misdemeanors also violations of the ordinance, prosecute under §§186.0177, 317.201, 322.262(1) and 860.01, F. S.?

5. Is a person charged with violating a municipal ordinance prohibiting the driving or operating of a motor vehicle while under the influence of intoxicating beverages to the extent that his normal faculties are impaired entitled to a jury trial?

AS TO QUESTION 1:

Section 186.03(34), F. S., defines police officer as "... Every officer of the municipal police department or any such officer authorized to direct or regulate traffic or to make arrests."

The legislature in speaking of police officers has specifically declared in §185.01, F. S.: "... [T]hat they keep the public peace; that they conserve both life and property and that their activities are vital to public welfare of this state. . . ." (See also *Headley v. Sharpe*, 138 So.2d 536.) Question 1 is answered in the affirmative.

AS TO QUESTION 2:

In the case of *Smith v. City of Gainesville*, 93 So.2d 105, the court in speaking of the state's authority to regulate and suspend drivers' licenses said at p. 106:

... There can be no doubt that in the regulation of the use of automobiles on the public highways the State has ample power to require motor vehicle operators to obtain drivers' licenses. It likewise has the correlative power to impose reasonable restrictions on the use and enjoyment of the license. This, in turn, involves the power to make proper provision

for the suspension or revocation of a driver's license under appropriate conditions and upon the occurrence of stipulated situations. . . .

After a careful study and analysis of all provisions contained in §§322.261 and 322.262, F. S., there can be no doubt but that it was the legislative intent to grant unto all courts having trial jurisdiction of a person charged with driving and operating a motor vehicle while under the influence of intoxicating beverages, the authority and duty to conduct a hearing, when duly requested, on the question of whether a chemical test was lawfully refused.

In conducting a hearing on the question of whether a chemical test was lawfully refused the legislature specifically provided that the following issues shall be determinative:

1. Whether the arresting officer has reasonable cause to believe the person had been driving a motor vehicle while under the influence of alcoholic beverages.

2. Whether the person was placed under lawful arrest.

3. Whether he refused to submit to the test after being requested to do so by the officer.

4. Whether he had been told that his driving privilege would be suspended if he refused to submit to the test.

When the revocation or suspension of a driver's license is made mandatory by statute, the trial judge merely follows the mandate of the statutes as the administrative representative of the department of public safety. *Smith v. City of Gainesville, supra.*

Therefore, a municipal court is the proper court to conduct a hearing on the question of refusal to take a chemical test when a person has been charged with violating a municipal ordinance making it unlawful to drive or operate a motor vehicle while under the influence of intoxicating beverages.

AS TO QUESTION 3:

When a driver is stopped and arrested for operating a motor vehicle while under the influence of intoxicating beverages to the extent that his normal faculties are impaired he is entitled, under the provisions of §322.261(1)(g), F. S., to request the arresting officer to have a chemical test made to determine the alcoholic contents of his blood. If a request is made the arresting officer shall have the test performed and the expense for such test shall be paid for by the governmental unit employing the arresting officer. There does not appear to be any conflict between §§322.261(1)(g) and 322.261(2)(c), inasmuch as the provisions of §322.261(2)(c) appear to authorize a person who has been tested by the arresting officer to have at his own expense a physician, registered nurse, licensed clinical laboratory technologist or clinical laboratory technician or any other person of his own choosing administer a test.

AS TO QUESTION 4:

Section 322.262(1), F. S., complements §186.0177, F. S., and all prosecutions in municipal courts must be for the violation of municipal ordinances.

AS TO QUESTION 5:

Section 3 of Ch. 67-308, Laws of Florida, (§322.262(4), F. S.) provides as follows:

Any person charged with driving while under the influence of alcoholic beverages to the extent that his normal faculties

were impaired shall be entitled to trial by jury according to the Florida Rules of Criminal Procedure.

Florida Rules of Criminal Procedure as adopted and approved by the Supreme Court of Florida, on March 1, 1967, appear in 196 So.2d 124. It is specifically provided in Rule 1.010 that "These rules shall govern the procedure in all criminal proceedings in state courts." Immediately following this rule is a committee note which states "These rules are not intended to apply to municipal courts, but are intended to apply to all state courts where 'crimes' are charged." The violations of municipal ordinances are "infractions" or "offenses" against a municipality and are not crimes. The jurisdiction of a municipal court is limited in that it may only try persons charged with the violation of municipal ordinances.

In the case of *Boyd v. County of Dade*, 123 So.2d 323, the court said in pointing out it had set at rest for all time the question of right to trial by jury in a municipal court for violation of municipal ordinances, on p. 328:

In an unbroken line of cases since *Hunt v. City of Jacksonville*, we have held that violations of municipal ordinances were infractions, the trial for which could be conducted without a jury trial.

Therefore, a person charged with violating a municipal ordinance prohibiting the driving or operation of a motor vehicle while under the influence of an intoxicating beverage is not entitled to a jury trial in municipal court.

067-76—December 1, 1967

**COUNTY SUPERINTENDENTS OF PUBLIC INSTRUCTION
APPOINTIVE SUPERINTENDENTS PURSUANT TO §2B, ART. XII,
STATE CONST.—EFFECT OF EFFECTUATION ON TERM OF
OFFICE OF ELECTIVE SUPERINTENDENT**

*To: Floyd T. Christian, State Superintendent of Public Instruction,
Tallahassee*

QUESTION:

What effect does the determination of the electors of Broward County in Nov., 1967, to make the office of county superintendent of public instruction appointive, have upon the term of office of the superintendent elected at the general election in 1964 for a four-year term?

Section 2B of Art. XII, State Const., was ratified by the people of Florida in 1962. In 1963 the Supreme Court of Florida, in the case of *Hancock v. Board of Public Instruction of Charlotte County, et al.*, 158 So.2d 519, was called upon to determine the effect of the adoption of said §2B upon the term of a county superintendent elected prior to the adoption of that section. The court, in the *Hancock* case, used the following language:

Amended Article XII, as proposed and adopted, does not specifically or by inference repeal the provision of Article VIII, Section 6 of the Florida Constitution which provides for a four-year term of office for all county superintendents of

public instruction. We find in Amended Article XII no repeal of any constitutional provision relating to the office of county superintendent except the proviso that such office shall be elective.

The court, therefore, said that the adoption of §2B of Art. XII, State Const., merely changed the method of selection of a county superintendent, but made no change in §6 of Art. VIII, State Const., which section provided that the term of office of the county superintendent (and other county officials) was 4 years.

After the Hancock decision had determined that the amendment to Art. XII, State Const., did not affect the term of office as provided by Art. VIII, State Const., the people of Florida, on Nov. 8, 1966, ratified an amendment to Art. VIII by adding thereto a new section designated 6A to take effect Nov. 9, 1966, which reads as follows:

... In those counties authorized to appoint a superintendent of public instruction under Article XII of the state constitution the superintendent shall serve at the pleasure of the board provided that the board may enter into a contract of employment with such appointed county superintendent which contract shall not extend beyond the thirtieth day of June in the year in which the terms of a majority of the members of the board of public instruction shall expire. The county superintendent shall not be commissioned by the governor but shall be required to file with the county board of public instruction a good and sufficient bond and in such sum and upon such condition as the legislature by law shall prescribe for elective superintendents as provided by Section 7, Article VIII of the state constitution.

Now, therefore, a situation exists which did not exist at the time of the Hancock decision and that is that in addition to the permitted change in the method of selection of a county superintendent under Art. XII, State Const., the people have amended Art. VIII, State Const., to provide that in those counties where the superintendent is appointed his term is no longer 4 years, but on the contrary his service is at the pleasure of the county school board.

Therefore, when the electors of Broward County, by authority of §2B, Art. XII, State Const., elected to make the office of county school superintendent in Broward County an appointive office, §6A, Art. VIII, State Const., thereupon became the governing constitutional section relative to the term of office of the county superintendent.

The term of the Broward County superintendent who was elected in 1964 expired upon the determination by the electors of Broward County to make the office of school superintendent an appointive office.

Section 14, Art. XVI, State Const., provides as follows: "... All State, County and Municipal officers shall continue in office after the expiration of their official terms until their successors are duly qualified."

Therefore, although the term of the elected superintendent in Broward County has now expired, he continues in office until such time as his successor is duly qualified pursuant to §6A, Art. VIII, State Const.

067-77—December 1, 1967

MOTOR VEHICLES—SAFETY REGULATIONS

MOTORCYCLES—CONSTRUCTION OF CH. 67-298, LAWS OF FLORIDA, AMENDING §317.981, F. S., REQUIRING OPERATORS TO WEAR CERTAIN SAFETY EQUIPMENT—VEHICLES OF POLICE OFFICERS EQUIPPED WITH WINDSHIELDS

To: Joe H. Mount, Assistant City Attorney, Tampa

QUESTION:

Do motorcycles of the City of Tampa Police Department equipped with windshields relieve the operators thereof from the requirements of Ch. 67-298, Laws of Florida, providing that riders on motorcycles shall wear crash helmets and protective safety masks, protective safety glasses or protective safety goggles at all times the vehicle is in motion?

Section 317.981, F. S., was amended by Ch. 67-16, Laws of Florida, and provided in part as follows:

(1) It is unlawful for any person to ride on any motorcycle or motor-driven cycle:

(a) Except on a seat permanently attached to such vehicle and specifically designed to carry such person in a safe manner.

(b) Except that such persons shall wear crash helmets and protective safety masks or protective safety goggles at all times such vehicle is in motion.

* * * * *

Chapter 67-16 became a law without the governor's approval and was filed in the office of secretary of state May 4, 1967.

However, the legislature enacted Ch. 67-298, Laws of Florida, which amended paragraph (1)(b) of Ch. 67-16, Laws of Florida, by the addition of "protective safety glasses." This amendment became a law without the governor's approval and was filed in the office of secretary of state July 5, 1967, and provides as follows:

(1) It is unlawful for any person to ride on any motorcycle or motor-driven cycle:

(b) Except that such persons shall wear crash helmets and protective safety masks, *protective safety glasses* or protective safety goggles at all times such vehicle is in motion. (Emphasis supplied.)

It therefore appears obvious that the legislature by the inclusion of "protective safety glasses" as one of the optional equipments that must be worn for the protection of the eyes of any person riding a motorcycle, had in mind the ease, safety and comfort of peace officers and others that may be riding for extended periods of time.

A study and analysis of the provisions of §317.981, F. S., as amended, leaves no doubt that the wearing of crash helmets is made mandatory. The wearing of safety equipment for the protection of the eyes is also made mandatory. However, the protective equipment for the protection of the eyes may be either a protective safety mask, protective safety glasses or protective safety goggles.

This is not to say windshields on motorcycles do not offer the rider added protection against the wind. However, the legislature must have felt windshields did not offer as much protection against rocks, gravel, insects and other small objects as would safety goggles, safety glasses or safety masks. They would offer no protection to any rider that may be thrown from his motorcycle as the result of an accident.

The legislative enactment is specific in requiring that all persons "shall wear" protective masks, glasses or goggles. Windshields mounted on motorcycles become a part of the vehicle and as such are incapable of being worn by an individual. The legislature in the enactment of Ch. 67-298, Laws of Florida, did not see fit to exempt law enforcement officers or any other persons from the requirements as prescribed therein. Neither has the legislature exempted any motorcycle or motor-driven cycle from the provisions of Ch. 67-298, Laws of Florida, regardless of whether it may be owned by a governmental agency or an individual. On the contrary, they have specifically provided that: "it is unlawful for *any person* to ride on *any motorcycle* or motor-driven cycle unless that person wears a crash helmet and protective safety mask, protective safety glasses or protective safety goggles at all times the vehicle is in motion." (Emphasis supplied.)

Your question is therefore answered in the negative.

067-78—December 1, 1967

PUBLIC DEFENDERS

CONSTRUCTION OF §27.51(1), F. S., AS AMENDED BY CH. 67-539, LAWS OF FLORIDA, AS AUTHORIZATION FOR DEFENDER TO REPRESENT PERSON CHARGED WITH ANY FELONY, CAPITAL OR NONCAPITAL

To: *Walter N. Colbath, Jr., Public Defender, West Palm Beach*

QUESTION:

Does §27.51(1), F. S., as amended by Ch. 67-539, Laws of Florida, authorize a public defender to represent an insolvent defendant who is charged with any felony, whether a capital felony or a noncapital felony?

Section 27.51(1), F. S., as amended by Ch. 67-539, Laws of Florida, reads as follows:

(1) The public defender shall represent without additional compensation as provided in §909.21, any person who is determined to be insolvent as provided in this act, *who is under arrest for, or is charged with, a felony. In any proceeding in a juvenile court* in any county of this state having a population in excess of three hundred ninety thousand, according to the latest official decennial census, where a child is alleged to be a delinquent child pursuant to a petition filed therein and the said child is determined to be insolvent, and if such child requests, or the court on its own motion appoints, the public defender or assistant public defenders shall represent said child. In any proceeding in a juvenile court in any remaining county of this state where a child is alleged to be a delinquent child pursuant to a petition filed therein and the said child is determined to be insolvent, and if such child requests, and the court on its own motion appoints, the director of the division

of youth services of this state shall appoint counsel to represent said child from the legal department of the division of youth services. If legal counsel is not available from the division of youth services, the juvenile court may appoint the public defender, assistant public defender or private counsel to represent the alleged delinquent indigent child. Nothing herein contained shall prevent the trial court from appointing private counsel in capital cases as provided in §909.21. The clerk of the court conducting such proceedings is directed to make such proceedings a matter of record. (Emphasis supplied.)

For the reasons hereinafter stated, I think that said subsection (1) must be interpreted as extending the jurisdiction of public defenders to capital felonies (they had jurisdiction in noncapital felony cases prior to its enactment), in order to give effect to the intent of the legislature. A literal interpretation would lead to incongruous results never intended by the legislature.

If the first sentence of said subsection were applied literally, as written and punctuated, it would deprive the public defenders of all jurisdiction except in juvenile courts. The first sentence would restrict them to juvenile courts in counties having a population of over 390,000, while the second sentence would confine their operations to juvenile courts in counties having a lesser population. Nowhere would there be any authorization for them to represent any defendant charged with any kind of felony in a trial court. [Juvenile courts can try the issue of whether certain juveniles are "delinquent children" by reason of having committed crimes but cannot try, convict and sentence for the crimes themselves].

Yet the very reason for the enactment of the public defender law was to comply with the Gideon decision by making provision for supplying counsel for indigent persons charged with noncapital felonies. (§909.21, F. S., has long made such provision for capital cases). This is evidenced by the fact that until the enactment of said subsection (1) in 1967, the previous versions of said subsection made it the duty of public defenders to represent indigent persons charged with noncapital felonies. Thus, a literal construction of the first sentence would cause an absurd result. Instead of restricting the public defender's jurisdiction, the legislature meant to enlarge it.

Said first sentence furnishes intrinsic evidence that the legislature meant to enlarge the jurisdiction of public defenders so as to include capital felony cases. To illustrate the point, we again quote said sentence, with appropriate words in italics, viz.:

(1) The public defender shall represent *without additional compensation as provided in §909.21*, any person who is determined to be insolvent as provided in this act, who is under arrest for, or is charged with, a felony. In any proceeding in a juvenile court in any county of this state having a population in excess of three hundred ninety thousand, according to the latest official decennial census, where a child is alleged to be a delinquent child pursuant to a petition filed therein and the said child is determined to be insolvent, and if such child requests, or the court on its own motion appoints, the public defender or assistant public defenders shall represent said child. . . . (Emphasis supplied.)

There would have been no point in inserting the italicized words if the legislature had intended to restrict public defenders to juvenile courts, or unless the legislature intended to enlarge the scope of the activities of public defenders to include representation of insolvent persons in trials for capital offenses. Section 909.21, F. S., authorizes the trial court to appoint counsel for an insolvent defendant charged with a capital crime and provides for the compensation of such counsel "at the trial." A charge of having committed a capital crime can never be tried in a juvenile court; it can be tried only in the circuit court. Therefore, the fact that, rather than restricting public defenders to juvenile courts, in which §909.21 could never apply, the legislature intended to enlarge their jurisdiction to include capital crimes is evidenced by its action in inserting the italicized words to make sure that they would not receive compensation under §909.21 in addition to their salaries.

If said first sentence were taken literally, there would be no provision for the furnishing of counsel to an insolvent child charged with any type of delinquency other than that arising out of his commission of a felony, in a juvenile court, in a county with a population in excess of 390,000. Yet the second sentence provides for counsel for a juvenile charged in the juvenile court of any of the remaining counties with any type of delinquency whatever, regardless of whether the delinquency arises from the commission of a felony or of a misdemeanor, or from other conduct mentioned in §39.01(11), F. S. There would be no sound reason for any such discrimination between counties having a population of over 390,000 and those having lesser populations, and the intent to bring about such a discrimination should not be ascribed to the legislature where, as here, the legislature has clearly evidenced no such an intent. Instead of ascribing such an unreasonable intent to the legislature, I think that said subsection, properly construed, provides for counsel for every indigent child charged in any county in the state with delinquency arising from any type of conduct mentioned in §39.01(11), whether it involves the commission of any sort of law violation or not. [The Legislature was doubtless prompted to make provision for counsel in juvenile courts by the 1967 decision of the United States Supreme Court in the case of *In Re Gault*, 18 L. Ed. 2d 527, to the effect that in a juvenile court delinquency proceeding which may lead to commitment to a state institution, counsel must be appointed for the allegedly delinquent child if he is otherwise unable to procure counsel. Under §39.11, F. S., a child who is adjudged to be delinquent may be committed to a state industrial school, regardless of whether or not his delinquency involves the commission of any sort of crime, felony or misdemeanor].

Another reason for not interpreting the first sentence of said subsection (1) in a literal fashion is that the next to last sentence of said subsection provides that: "Nothing herein contained shall prevent the trial court from appointing private counsel in capital cases as provided in §909.21." When the legislature inserted this sentence, it tacitly recognized that in a preceding portion of the subsection it had authorized public defenders to represent insolvent defendants in capital cases, and it wanted to make it clear that §909.21 was not being repealed and that a trial court was to be left free to appoint private counsel in capital cases pursuant to its terms. If this had not been so, then there would have been no point in inserting said sentence.

Thus, if the first sentence of the above-quoted subsection (1) were taken literally at face value, the resulting interpretation would lead to unreasonable, objectionable and absurd consequences, that is to say, it would deal the death blow to the public defender system insofar as the primary purpose for its creation is concerned, that is, to furnish counsel to represent defendants in trial courts when they are charged with specified types of offenses.

An interpretation should be adopted which would avoid objectionable consequences (*Simmons v. State*, Fla., 36 So.2d 207, 209). The universal rule is that statutes must be so construed as to avoid absurd results (*Johnson v. State*, Fla., 91 So.2d 185, 191). The punctuation in a statute may be used as one of the guides to proper interpretation thereof but punctuation is considered to be the most fallible and the least reliable indication of the legislative intent in interpreting a statute (*Wagner v. State*, Fla., 88 So.2d 611, 613). And, as was further said by our Supreme Court in *State v. Sullivan*, 116 So. 255, 261:

... In statutory construction legislative intent is the pole star by which we must be guided, and this intent must be given effect even though it may appear to contradict the strict letter of the statute and well-settled canons of construction. The primary purpose designated should determine the force and effect of the words used in the act, and no literal interpretation should be given that lends to an unreasonable or ridiculous conclusion or a purpose not designed by the lawmakers. . . .

Applying these authorities in construing the first sentence of said subsection (1), I conclude that the only tenable construction that can be placed upon the pertinent part of the first sentence of subsection (1) is to construe it to read as follows:

(1) The public defender shall represent without additional compensation as provided in §909.21, any person who is determined to be insolvent as provided in this act, who is under arrest for, or is charged with, a felony. In any proceeding in a juvenile court. . . .

Consequently, it is my opinion that your question is properly answered in the affirmative.

067-79—December 1, 1967

**FLORIDA BUREAU OF LAW ENFORCEMENT
TRANSFER THERETO OF NARCOTICS BUREAU OF THE
STATE BOARD OF HEALTH**

To: *William L. Reed, Commissioner, Florida Bureau of Law Enforcement, Tallahassee*

QUESTION:

Does Section 4, Ch. 67-2207, Laws of Florida, require the transfer in total of all personnel and assets of the narcotics bureau no matter the administrative assignment of personnel and responsibility to duties other than the enforcement of the Uniform Narcotic Drug Law (Ch. 398, F. S.) and Florida Drug Abuse Law (Ch. 404, F. S.)?

Section 4, Ch. 67-2207, Laws of Florida, (§23.084, F. S.) reads as follows:

Narcotics Bureau, State Board of Health—Transfer of Authority.—All powers, duties, appropriations, authority, personnel and equipment heretofore vested in the state board of health with respect to the administration of the narcotics bureau of the state board of health shall be and are hereby transferred to and vested in the bureau.

The state board of health, through its narcotics bureau, administers several Florida statutes carrying criminal penalties. The narcotics bureau consists of employees, described as narcotic agents, who are assigned the primary duty of enforcement in the area of unlawful sale and use of narcotic drugs and barbiturates, and any other designated duty within the lawful authority of the board of health.

Presently the agents of the narcotics bureau are assigned additional duties under Chs. 381, 458, 459, 460, 461, 462, 465, 486, F. S. These are of an administrative nature requiring registration of certain practitioners. Chapter 500, F. S., is a further duty relating to the adulteration and false branding of food, drugs, devices and cosmetics.

While the above have been the assigned responsibility of narcotics bureau agents, they do not fall within the intended purview of the proposed transfer. The subject matter of the above duties is only remotely connected with enforcement of narcotic and barbiturate laws. From the types of crimes enumerated in section 6(5), (Ch. 67-2207, Laws of Florida) (§23.086(5), F. S.) . . . organized crime, vice, racketeering, rioting, inciting to riot, insurrection and misconduct of public officials . . . it would appear its intention to attack areas of major crime requiring specialized attention rather than routine administration would include the field of narcotics but not that of other functions of the board of health. The obvious intent was for only the basic and primary functions to be transferred rather than the total of whatever assignments may have at that particular time been delegated to the narcotics bureau.

The board of health has many responsibilities not heretofore enumerated, such as the licensing of hospitals (Ch. 395 F. S.) and if for some internal reason had this investigative purpose been assigned to the narcotics bureau, it would, under a broad interpretation of §4, now be one of the duties transferred to the Florida Bureau of Law Enforcement.

It would appear that the intent of the legislature was limited to enforcement of Chs. 398 and 404, F. S., thereby enabling the board of health to continue its duties under other chapters, notwithstanding prior assignments given to personnel of the narcotics bureau.

067-80—December 1, 1967

ELECTORS AND ELECTIONS

CAMPAIGN CONTRIBUTIONS BY UTILITIES, BEVERAGE LICENSEES AND PARI-MUTUEL OPERATORS

To: *Tom Adams, Secretary of State, Tallahassee*

QUESTIONS:

1. Is §99.161(1)(b), F. S., enforceable in the state at this time and, if so, to what extent?
2. May a corporation engaged in a business not within the prohibition of §99.161(1), F. S., contribute to a candidate for

political office within the limits prescribed by law where the corporation has wholly owned subsidiaries operating clubs containing restaurant and cocktail lounge facilities holding beverage licenses issued by the state beverage department?

3. May a corporation engaged in a nonprohibited business contribute to a candidate for political office within the limits prescribed by law when that corporation has wholly owned subsidiaries operating utilities systems a portion of which at least are subject to the regulation of the public service commission?

4. With same fact situations as are outlined in questions 2 and 3 above, may the officers and directors of the parent corporation who are not also officers and directors of the wholly owned subsidiary corporations make individual political contributions to candidates for public office?

5. Would your answer to questions 2, 3 and 4 also apply to corporations holding horse or dog racing permits or their officers and directors?

This is in response to your letter of Nov. 22, 1967, wherein you make reference to the recent circuit court decision of the Second Judicial Circuit in *Sutton v. Adams* and ask the questions set forth above relative to the enforcement of the election laws concerning contributions by beverage licensees and corporations owning subsidiary utilities.

In *Sutton v. Adams*, Judge Taylor struck down §99.161(1)(b), F. S., as being unconstitutional. The matter is now on appeal to the supreme court and thus the action of the circuit court would be stayed and the statute prohibiting contributions by beverage licensees would remain in effect until such time as the action of the lower court is affirmed with finality.

Corporations which are not within the purview of §99.161(1), F. S., may contribute to political campaigns under the provisions of §104.091, F. S., as amended during the 1967 Legislature. If such a corporation has a wholly owned subsidiary engaged in the activities regulated under §99.161(1), F. S., then the subsidiary corporation and the officers would be precluded from making political contributions.

By the same token the officers and directors of a corporation which does not engage in the activities regulated under §99.161(1), F. S., may contribute their own personal funds to political campaigns as authorized under the provisions of §104.091, F. S. The directors and officers of any subsidiary corporations would, however, be prohibited from making such contributions under the provisions of §99.161(1), F. S.

Questions 4 and 5 are answered accordingly.

067-81—December 5, 1967

RECORDING PUBLIC DOCUMENTS

JUDGMENT LIENS IN OFFICIAL RECORDS—CONSTRUING §§28.221 AND 55.10, F. S.

To: *Page S. Jackson, Pinellas County Attorney, Clearwater*

QUESTION:

What is the procedure for recording judgment liens in official records in light of the amendment to §55.10, F. S., found in Ch. 67-254, Laws of Florida?

It is a general rule of statutory construction that all statutes relating to the same subject should be read in *pari materia*, *State ex rel.*,

McClure v. Sullivan, Fla., 43 So.2d 438; Sanders v. State *ex rel.*, Shamrock Properties, Fla., 46 So.2d 491, and Okaloosa Co. Water & Sewer Dist. v. Hilburn, Fla., 160 So.2d 43, and effect must be given to each if reasonably possible so as to produce a harmonious result. Snively Groves v. Mayo, 135 Fla. 300, 184 So. 839, and Ozark Corp. v. Pattishall, 135 Fla. 610, 185 So. 333.

In this regard it appears that the amended provisions of §55.10, F. S., should be read in pari materia with the other recording statutes. In those counties using official records as authorized in §28.221, F. S., judgments and decrees become liens on the property when properly recorded. Proper recordation under §28.221(4), F. S., contemplates recording of "certified transcripts of judgments and decrees" for the proper recordation of judgment liens.

Accordingly, even though §55.10, F. S., does not specifically mention the recording of certified transcripts it does appear that such should be recorded in order to comply with the provisions of §28.221(4), F. S., and §55.10, F. S., to effect a complete recording of judgment liens in official records. Your question is answered accordingly.

067-83—December 15, 1967

APPROPRIATION BILL

GOVERNOR'S AUTHORITY TO VETO ITEMS CONDITIONED UPON THE HAPPENING OF CERTAIN EVENTS

To: Claude R. Kirk, Jr., Governor, Members of the Cabinet, Senator
T. Truett Ott, Tallahassee

QUESTIONS:

1. What is the effect of the governor's attempted veto of Section 14, Ch. 67-300, Laws of Florida, upon the appropriation contained in Item 610a of Section 1, Ch. 67-300, as implemented in part by Ch. 67-2207, Laws of Florida?

2. May the governor or the State Planning and Budget Commission distribute or "appropriate" any portion of the funds specified in Item 610a and not appropriated by implementing legislation such as Section 11, Ch. 67-2207, Laws of Florida?

AS TO QUESTION 1:

Chapter 67-300, Laws of Florida (hereinafter designated the Appropriations Bill), provided in Item 610a, Section 1, an appropriation of \$750,000 for the year 1968 and the same sum for the year 1969. The appropriations were directed to the "War on Crime." But Section 14 of the Appropriations Bill expressly conditioned the "moneys appropriated in Item 610a of Section 1" upon "implementing legislation becoming law." The 2 sections, then, are integral to one another: allocation of the \$750,000 provided in Section 1 is contingent upon satisfaction of the condition imposed by Section 14.

Inasmuch as the governor's attempted veto of Section 14 of the Appropriations Bill was a nullity, for the reasons elaborated in my letter of July 10, 1967, to Senator Ott, Section 14 remained a condition precedent to the allocation of Section 1, Item 610a funds.

Subsequently, the legislature implemented the "War on Crime" by creating the Florida Bureau of Law Enforcement by enactment of Section 11, Ch. 67-2207, Laws of Florida, (§282.011(25), F. S.) of which directly appropriated \$625,000 per year to the bureau and reduced by a corresponding figure the funds available in Item 610a of the Appropriations Bill.

To this point, then, there remains of the funds provided in Section 1, Item 610a, exactly \$125,000 for the year 1968 and the same sum for the year 1969. Allocation of these funds is contingent upon satisfaction of the condition imposed by Section 14 of the Appropriations Bill.

AS TO QUESTION 2:

The \$125,000 appropriated for the "War on Crime" in 1968, and the same sum in 1969, by Section 1, Item 610a, of the Appropriations Bill, may not be allocated except upon the enactment of implementing legislation.

Transfer of these funds by the governor or the State Planning and Budget Commission would, except under certain extraordinary circumstances contemplated by statute, run athwart the clear-cut policy of the legislature. Section 282.061, F. S., transfers of appropriations of the "Spending Philosophy Bill," provides:

... Unless otherwise expressly provided by law, appropriated moneys shall be expended only for the purpose for which appropriated, except that if not required for such purposes, said moneys may upon approval of the planning and budget commission as being justifiable and in the best interests of the state, be transferred within the affected requesting agency's accounts as follows: ...

The requirement of §282.061, F. S., that any transfer be of an intraagency character, taken together with the still more restrictive enumerated purposes for which only certain transfers may be made, would preclude, for example, transfer of the remaining Item 610a funds to the police standards council. Moreover, in light of the legislature's authority to appropriate the public's money as it deems wise and proper, the biennial appropriation of \$38,000 to the police standards council would appear to be conclusive of the legislature's intention.

Absent the State Planning and Budget Commission consideration of a proposed intraagency transfer of the restricted type contemplated by §282.061, F. S., the \$125,000 of Item 610a funds are susceptible of allocation only upon passage of proper legislation.

067-84—December 18, 1967

TAXATION

ASSESSMENT OF STOCK-IN-TRADE—CONSTRUCTION OF CH. 67-376, LAWS OF FLORIDA, AMENDING §192.05, F. S.

To: *Fred O. Dickinson, Jr., State Comptroller, Tallahassee*

QUESTIONS:

1. Does Ch. 67-376, Laws of Florida, designate the taxing date for inventories as January 1 of the year in which inventory assessments are made?
2. Does Ch. 67-376, Laws of Florida, exempt raw material inventories, goods-in-process-of-manufacturing inventories, and inventories of maintenance supplies and equipment?

AS TO QUESTION 1:

Chapter 67-376, Laws of Florida, is to take effect as an amendment to §192.05, F. S., on Dec. 31, 1967, and has no retroactive application. Hence, the taxing date specified in and by §192.05, F. S., prior to this amendment, is controlling of 1968 and 1969 taxes.

AS TO QUESTION 2:

At the very outset I should explain that there are literally hundreds of cases in this state and others treating of definitions and distinctions, consideration and analysis of which is prerequisite to my provision of an answer to your question. These cases have now been researched and considered, and I have been given the benefit of comprehensive briefs by my staff. Suffice it to say, any lawyer worth his salt could prepare a reasonable argument on either side of the many issues involved. Consequently, I shall take the liberty of answering your question by means of a presentation free of the Niagara of citations of authority customarily included in opinions.

Prior to the 1967 amendment with which we are concerned, §192.05, F. S., treated of "goods, wares and merchandise or stock in trade . . ." Our Supreme Court in 1941 defined "stock in trade" as including "all chattels which the merchant acquires and puts into his place of business for use in his trade or for the purpose of sale . . ." *Warren Co., Inc., v. Howell*, 147 Fla. 602, 3 So.2d 167.

By the 1967 amendment (Ch. 67-376, Laws of Florida) the legislature introduced into the act the term "inventory," thereby evidencing, as I shall explain, an intention to limit the scope of §192.05, F. S.

This intention to limit the scope of the act was manifested by the legislature in two compelling ways. First, the legislature declared in the act's initial WHEREAS clause that tangible personal property held for sale or lease, and "commonly known as stock in trade" or "inventory," had been subjected to an arbitrary, inequitable and excessive tax. Secondly, as if to adumbrate the inclusive disjunction of "stock in trade" and "inventory," the legislature provided in subsection (3) of the act that each taxpayer's return be accompanied by "a copy of the taxpayer's federal income tax return disclosing the value of the taxpayer's inventory." Indulging the eminently reasonable assumption that the legislature knew the meaning of "inventory" as required by the federal income tax return, I would direct your attention to the Prentice-Hall Federal Tax Guide, §441, para. 20, 651, headed "inclusions":

The inventory is an itemized list of goods held for sale in the ordinary course of business as of the last day of the taxable year. It includes all finished or partly finished goods, but, in the case of raw materials and supplies, only those acquired for sale or which will become a part of merchandise intended for sale.

In fine, Ch. 67-376, Laws of Florida, addresses itself to such tangible personal property as is held for sale as inventory (commonly known as stock-in-trade).

Using as a touchstone the relevant judicial definitions and the act's characterization of its subject matter as that stock-in-trade or inventory held for sale, I believe that goods in the process of manufacture and raw materials held for physical incorporation into the goods to be sold are a part of that subject matter.

The act does not mention machinery, fixtures or other equipment used in the manufacture, storage, or display or other handling or processing of the inventory or stock-in-trade. The legislative intent would thus appear to be that the aforementioned objects be outside the exemptions effected by Ch. 67-376, Laws of Florida; but previously cited Florida law holds such machinery, fixtures and trade conveniences to be entailed by the term stock-in-trade. This seeming incongruence between the presubstisting law and the legislative intent resident in Ch. 67-376 strongly suggests the need presently to execute the latter as

binding law until or unless the contrary should be unquestionably established by legislative determination.

Granting the rigorous thought and great effort that contributed to the preparation and enactment of Ch. 67-376, Laws of Florida, it becomes clear, as an after-the-fact judgment, that the act requires amendment. An explicit definition and clarification of the act's terminology should have a preclusive effect upon the confusion and costly litigation to which Ch. 67-376 threatens to give rise. I have, therefore, made it known that I shall request the governor to include in his call for the special session consideration of a definitional and clarificatory amendment to Ch. 67-376, Laws of Florida.

In the meantime, the several tax assessors might well proceed with the 1968 assessment in accordance with the evident legislative intent.

067-85—December 20, 1967

PUBLIC DEFENDERS

ASSISTANCE BY PUBLIC DEFENDER—CLAIM AGAINST RECIPIENT'S ESTATE—ENFORCEMENT—CONSTRUCTION OF §27.56, F. S., AS AMENDED BY CH. 67-539, LAWS OF FLORIDA

To: *R. A. Green, Jr., Public Defender, Gainesville, and Page S. Jackson, Pinellas County Attorney, Clearwater*

QUESTION:

What effect did the enactment of Section 7, Ch. 67-539, Laws of Florida, have on §27.56, F. S., which creates a lien against the estate of any person receiving assistance by public defenders and providing for the enforcement of said lien.

Section 27.56, F. S., prior to its amendment by Section 7 of Ch. 67-539, Laws of Florida, was derived from Section 3, Ch. 63-410, Laws of Florida, and consisted of but a single paragraph. Section 7 of Ch. 67-539, retained the provisions of §27.56, prior to its amendment without change, designating said section as subsection (1) of the revised or amended section, and adding thereto revised subsections (2) and (3), subsection (2) being divided into 3 paragraphs, §27.56, F. S., as amended being as follows:

. . . (1) There is hereby created a lien, enforceable as hereinafter provided, upon all the property, both real and personal, of any person who is receiving or has received any assistance from any public defender of the state. Such assistance shall constitute a claim against the applicant and his estate, enforceable according to law in an amount to be determined by the court in which such assistance was rendered. Immediately after such assistance is rendered and upon determination of the value thereof by the court, a statement of claim showing the name and residence of the recipient shall be filed for record in the office of the clerk of the circuit court in the county where the recipient resides and in each county in which such recipient then owns or later acquires any property. Said liens shall be enforced on behalf of the state by the several public defenders, and shall be utilized to reimburse the state to defray the costs of the public defender system. The lien herein created shall be a continuing obligation, irrespective of any statute of limitations.

(2) (a) In lieu of the procedure above described, the court

is authorized to require that the recipient of the public defender's services execute a lien upon his real or personal property, presently-owned or after-acquired, as security for the debt created hereby for the value of the services rendered or to be rendered by the public defender. Such lien shall be recorded by the public defender in the public records of the county at no charge by the clerk of the circuit court and shall be enforceable in the same manner as mortgages.

(b) The board of county commissioners of the county wherein the recipient is tried is authorized to enforce, reduce to judgment, satisfy, compromise, settle, subordinate, release, or otherwise dispose of any debt or lien hereby imposed.

(c) No lien thus created shall be foreclosed upon the homestead of such recipient.

(3) The court having jurisdiction of the defendant-recipient, may, at such stage of the proceedings as the court may deem appropriate, determine the value of the services of the public defender, at which time the defendant, after adequate notice thereof, shall have opportunity to be heard and offer objection and to be represented by counsel, with due opportunity to exercise and be accorded the procedures and rights provided in the laws and court rules pertaining to civil cases at law.

The intention and purpose of the legislature is the primary object in the construction of statutory amendments. Amendments are to be construed, together with the original statute to which they relate as constituting one law, and also together with other statutes on the same subject, as a part of a coherent system of legislation. The provisions of the amendatory and amended laws are to be harmonized, if possible, so as to give effect to each, and leave no clause of either inoperative; and, where an amendment is subject to two or more constructions, either of which is warranted by the language, that is to be preferred which best harmonizes with the statute amended. If there is an irreconcilable conflict, the amendatory act will control, as being the latest expression of the legislature. It is presumed that an amendment is made to effect some purpose, which may be either to alter the operation and effect of earlier provisions or to clarify the meaning thereof, and it is also presumed that the legislature amends a statute with knowledge of existing statutes and existing conditions of the common law and that it does not do a vain thing. (82 C.J.S. 895, *et seq.*, §384).

The original and first subsection of said section creates a lien upon the property of the person receiving assistance from the public defender or his assistant, which lien constitutes a claim against the person receiving such assistance and his estate. "Said liens shall be enforced *on behalf of the State of Florida* by the several public defenders. . . ." These provisions provide a procedure for enforcing the lien against persons receiving assistance from public defenders, which prior to the effective date of Ch. 67-539, Laws of Florida, was the sole and only procedure for enforcing the said lien. Section 27.56(2)(a), F. S., provides that: "In lieu of the procedure above described" the procedure set out in paragraph (a) may be used to enforce the said lien. This procedure differs from that set out in subsection (1) in that it provides for the filing of the statement of the claim as therein provided, while subsection (2) provides a procedure by which the person receiving the assistance makes and executes a written lien, under the supervision of the court. The two lien procedures result in liens against the property of

the defendant which are subject to enforcement in the circuit court. The right to the lien and the proceeds therefrom is in the state.

The provision in §27.56(2) (b), F. S., that: "The board of county commissioners of the county wherein the recipient is tried is authorized to enforce, reduce to judgment, satisfy, compromise, settle, subordinate, release or otherwise dispose of any debt or lien hereby imposed." is not sufficient to vest the title or right to the lien or its proceeds in the county or in the board of county commissioners as such. The relationship of the said board of county commissioners to the state is that of ex officio officers; the statute makes the county commissioners ex officio state officers for the purposes of §27.56, F. S. The Supreme Court of Florida, in *Carlton v. Mathews*, 103 Fla. 301, 137 So. 815, text 842, recognized the power of the Florida Legislature to make the state treasurer an ex officio county treasurer for a proper purpose, so long as his duties as county treasurer do not conflict with his duties as state treasurer. We see no conflict of interest or duties which would prohibit a board of county commissioners from performing the functions required of them by §27.56(2) (b), F. S. The right of the legislature to impose additional duties upon an officer, even to the extent of requiring him to perform ex officio duties for other officers and offices, has been recognized by the Florida courts. The legislature appears to have made the boards of county commissioners of the several counties ex officio state officers, charged with the enforcement of such liens and the administration thereof, for and in behalf of the state, to the extent provided for in §27.56(2) (b), F. S.

I therefore, conclude that:

1. The liens and lien obligations arising under and by virtue of §27.56(1), F. S., as amended, belong to the state, and not to the county.

2. These liens of the state are enforceable by the public defenders, acting as attorneys for the state.

3. Section 27.56(2), F. S., provides for an alternative procedure for perfecting the lien raised by §27.56.

4. The proceeds from the enforcement of said liens are to be used to help defray the expenses of the statewide public defender system throughout the state.

5. These funds appear to be in the nature of trust funds earmarked toward defraying the expenses of the statewide public defender system.

6. The state being the owner and holder of the liens provided for in §27.56, F. S., should be enforced in the name of the state as plaintiff, with the public defender, or an assistant public defender, acting as attorney for the state.

7. Persons, firms and corporations claiming liens superior to that of the state (the priority of such liens is not decided here but is left to the courts) should proceed in conformity with §§48.121 and 69.041, F. S., should they desire to enforce their liens prior to enforcement by the state, obtaining service as therein provided.

067-87—December 28, 1967

CIRCUIT COURTS

ADDITIONAL JUDGES SIXTH CIRCUIT—CONSTRUCTION OF CH. 67-940, LAWS OF FLORIDA, PROVIDING FOR ESTABLISHMENT OF CENSUS COMMISSION PURSUANT TO §26.011, F. S.

To: *Claude R. Kirk, Jr., Governor, Tallahassee*

QUESTIONS:

1. Based upon the special census commission report, how many additional circuit judges should there be for the Sixth Judicial Circuit?

2. At what point do the vacancies in the additional circuit judgeships arise? Are the vacancies created at the moment the special census report is properly certified and filed in the governor's office?

3. In the event that vacancies exist upon the filing of the special census report, would persons be eligible to qualify for such vacancies in the 1968 primaries?

4. In the event the appointments are made to fill such vacancies, what would the length of the term be for such appointees?

5. If such a vacancy exists so as to permit persons to run in the 1968 primary and general election, how long would the term be for those elected in the 1968 primary and general election?

You advise that under the special census of Pasco and Pinellas Counties, taken under and pursuant to Ch. 67-940, Laws of Florida, and §26.011, F. S., it appears that said judicial circuit has a population of 577,050, so as to entitle it to a total of 12 circuit judges, 2 additional to the 10 heretofore appointed or elected and commissioned, upon the issuance by the governor of the proclamation provided for in §26.011(2), F. S. If this proclamation has been issued, the governor may select, appoint and commission the said 2 judges. The proclamation is necessary to make effective the census so that the appointments should not be made until the official issuance of the proclamation. This answers question 1.

I am of the opinion that the vacancies are created and arise when the proclamation is issued by the governor. This answers question 2.

Upon the issuance of the governor's proclamation under §26.011(2), F. S., the 1967 special census will become effective and the sixth judicial circuit will be entitled to a total of 12 circuit judges, of which 10 have heretofore been appointed or elected and commissioned. These two vacancies should be filled by the governor and the appointees commissioned by him as such circuit judges, to serve until the first Tuesday after the first Monday in Jan. 1969, under §6, Art. XVIII, State Const., on which date a vacancy will occur unless the said office be filled by an election under and pursuant to §7, Art. XVIII, State Const., in which case the office would be filled until the first Tuesday after the first Monday in Jan. 1973, by election at the general election in 1972. Question 3 is answered in the affirmative.

Question 4 is answered in effect by the above argument concerning question 3, where it is held that the governor fills the vacancies until the first Tuesday after the first Monday in Jan. 1969, with the said offices being filled by election at the general election in 1968, until the first Tuesday after the first Monday in Jan. 1973. This answers question 4.

If the appointments are promptly made I see no reason why nominations may not be made at the primary elections in 1968 for the portion of the term beginning in Jan. 1969, and ending the same time in 1973.

067-88—December 28, 1967

JURORS AND JURIES

TRANSCRIPTION AND PRESERVATION OF NAMES OF JURORS
APPEARING ON JURY LIST—REQUIREMENT FOR
COMPLIANCE WITH §40.06, F. S.*To: Earl R. Adams, Clerk of Circuit Court, Monroe County, Key West*

QUESTION:

Does the requirement of §40.06, F. S., that the clerk shall write the names on a jury list on separate pieces of paper be complied with if he used a carbon or photostat copy of the original list and cut it into separate pieces of paper and rolled or folded such pieces of paper to be placed in the jury box? The pertinent part of §40.06, F. S., provides that:

40.06 Transcription and preservation of lists.—On receiving the list of persons selected as qualified to serve as jurors, as provided for in §40.02, the clerk of the circuit court, in the presence of the county judge or a circuit judge in the absence, sickness or disability of the county judge and the sheriff, *shall write* the names of the persons contained in said list on separate pieces of paper and shall roll or fold such pieces of paper so that the names written thereon will not be visible and shall deposit such pieces of paper in a box so constructed that it may be tightly closed. . . . (Emphasis supplied.)

I think that the command of the statute that the clerk shall write the names of the persons on the jury list on separate pieces of paper does not require that he write such names with pen and ink. On the contrary, it is my view that he writes the names if he typewrites them or photographs them or uses a carbon copy. (See the treatment of "write," "writing," and "written" in 101 C.J.S. 638-640.)

However, I note that §40.06, F. S., requires the clerk to write the names on separate pieces of paper, in the presence of the county judge, or the circuit judge in specified situations, and the sheriff. I can think of no purpose to be served by this requirement unless the judge and the sheriff check the names written down by the clerk against the jury list so as to insure that they are the same; the presence of the judge and sheriff would be meaningless if they did not so check. It seems to me that the purpose of the requirement is to guarantee that the names placed in the jury box are the same as the names on the jury list.

My conclusion is that the statute would be complied with in this regard if the clerk either typewrites on a separate piece of paper the name of each person on the jury list, or if he accomplishes the same result by cutting into separate pieces, each bearing the name of one person, a photographic or carbon copy of the jury list, and if thereafter, with the clerk, judge and sheriff all present, the judge and sheriff check the names on the separate pieces of paper against the original jury list and find that they are the same, and in the presence of the judge and sheriff the clerk then rolls or folds such pieces of paper so that the names written thereon will not be visible and deposits such pieces of paper in the jury box. Of course, there must be a compliance with the statute's requirement as to locking and sealing the box. [The use of carbon copies is not recommended. The names thereon are seldom as easy to read as typed names or photographic copies thereof.]

067-89—December 28, 1967

LICENSE PLATES FOR MOTOR VEHICLES

DRIVERS' LICENSES—NECESSITY FOR OUT-OF-STATE UNIVERSITY OR COLLEGE STUDENTS TO OBTAIN

To: Robert M. Deehl, Judge, Metropolitan Court, Miami

QUESTION:

Are out-of-state students attending the University of Miami and Miami-Dade Junior College required to obtain Florida automobile license plates and drivers' licenses when operating motor vehicles upon the streets and highways of Florida?

Section 322.04, F. S., in setting forth persons exempt from obtaining a driver's license provides in subsection (5) as follows:

The provisions of this section shall not apply to any nonresident who shall accept employment, or shall enter his children to be educated in the public schools of the state, *or a child of such nonresident who is at least sixteen years of age, but in such case or cases such nonresident or child of the nonresident shall be required to obtain a driver's license in the same manner as is required of residents of the state* before such nonresidents or children shall be permitted to operate any motor vehicle on the highways of the state. (Emphasis supplied.)

This section removes a nonresident or his child from the exemption provided in subsections (1)-(4), when there is employment or the child enters public schools. Thus, both the nonresident parent and child of a nonresident must obtain drivers' licenses to operate a motor vehicle upon the highways of Florida when there is either employment of the parent or the parent places his child in the public schools.

Section 228.14, F. S., specifically provides that junior colleges in the state are a part of the public school system of Florida. (See also §§230.01 and 230.02, F. S.)

The provision of Florida law removing nonresidents from the exempt status of purchasing Florida automobile license plates is found in §320.38, F. S., and reads as follows:

... When nonresident exemption not allowed.—

(1) The provisions of law authorizing the operation of motor vehicles over the highways of the state by nonresidents of this state, when such vehicles shall be duly registered or licensed under the laws of some other state or foreign country, shall not apply to any nonresident who shall accept employment, or engage in any trade, profession or occupation in this state. In every case where a nonresident shall accept employment, or engage in any trade, profession or occupation in the state, or shall enter his children to be educated in the public schools of the state, such nonresident shall be required to register his motor vehicles in this state, if such motor vehicles are proposed to be operated on the highways of the state.

This section requires that a nonresident obtain automobile license plates for operation of his motor vehicle upon highways of Florida when he either accepts employment or enters his children to be educated in the public schools of Florida. This section does not contain the words "*or a child of such nonresident who is at least sixteen years of age*" as is found in the driver's license section.

Therefore, out-of-state children who are the legal owners of record of an automobile used in this state while attending a junior college would not appear to be disturbed by the provisions of §320.38, F. S., inasmuch as the child himself is the student. However, any type employment, trade, profession or occupation by the student would subject him to the purchase of automobile license plates for the operation of a motor vehicle upon the highways of Florida. Also, any children of a student who may be placed in the public schools of Florida would subject the student-parent to the purchase of a Florida automobile license plate for operation in Florida.

It would therefore appear that out-of-state parents and a child at least 16 years of age of nonresident parents are required to obtain Florida drivers' licenses for the operation of motor vehicles upon the highways of Florida when there is employment or the child is entered in the public schools of Florida. The University of Miami is not a part of the public school system of Florida. Therefore, out-of-state students attending the University of Miami are not required to obtain Florida drivers' licenses, unless the student accepts employment in Florida. However, Miami-Dade Junior College is a part of the public school system of Florida and out-of-state students in attendance at Miami-Dade Junior College are required to have Florida drivers' licenses when operating motor vehicles upon the streets and highways of Florida.

In the absence of a nonresident parent accepting employment, engaging in a trade, profession or occupation in Florida, his child is not required to have the parents' motor vehicle licensed in Florida when attending the University of Miami. Neither is a nonresident student attending Miami-Dade Junior College required to obtain a Florida license plate for a properly licensed out-of-state motor vehicle, when the owner of the vehicle is the student. However, when an out-of-state student attends Miami-Dade Junior College and operates a motor vehicle owned and titled in his parent's name, the motor vehicle must be licensed if operated upon the streets and highways of Florida.

067-90—December 28, 1967

REGULATION OF BOATS

LIGHTING REQUIREMENTS OF MOTORBOATS OF CLASSES A AND 1

To: *James M. Meade, Attorney, Orlando*

QUESTION:

Does the phrase "motorboats of Classes A and 1, when propelled by sail alone" include small sailboats for which the only means of propulsion is natural forces, i.e., "wind"?

In accordance with the definition set forth in §371.021(2), F. S., as follows:

... "Motorboat" means any boat or vessel propelled or powered by machinery in excess of ten horsepower whether or not such machinery is the principal source of propulsion.

Section 371.57(1)(b), F. S., sets forth the lighting requirements which must be met when motorboats under 16 feet in length are operated between sunset and sunrise as follows:

... 1. One white light aft, such light not to be obstructed by any part of the vessel so as to be visible in all directions.

2. One combination red and green light on fore part of boat showing green to starboard and red to port, so fixed as to throw the light from right ahead to two points abaft the beam on their respective sides.

3. Any motorboat may carry and exhibit the lights required by the international rules of the road (33 USC 143-147d), in lieu of the lights prescribed in this paragraph.

It should be noted that these provisions apply to motorboats under 16 feet in length when operated by motors in excess of 10 horsepower.

Section 371.57(7), F. S., provides as follows:

... (a) Motorboats of classes A and 1 when propelled by sail alone shall carry the combined lantern, but not the white light aft, prescribed by this section. Motorboats of classes 2 and 3, when so propelled, shall carry the colored side lights, suitably screened, but not the white lights, prescribed by this section.

(b) Every vessel shall, between sunset and sunrise, carry a lighting device capable of shining a white light all around the horizon and shall display such light in sufficient time to avoid collision with another vessel.

The above provisions of §371.57(7)(a), F. S., appear to relate to motorboats under 16 feet in length when operated by sail alone and require that they shall carry the combined lantern on the fore part of the boat showing green to the starboard and red to the port and should not carry and display the white light aft as prescribed in §371.57(1)(b)1., F. S.

The provisions under §371.57(7)(b), F. S., provide that every vessel, between sunset and sunrise, shall carry a white lighting device which must be displayed in sufficient time to avoid collision with another vessel. Section 371.66, F. S., provides as follows:

... Jurisdiction.—The safety regulations included under this part shall apply to all boats except as specifically excluded, operating upon the navigable waterways or inland lakes, ponds, streams, or any other waters in Florida. However, only §371.57(7), (8) shall apply to rowboats and canoes without motors, sailboats less than ten feet in length, airboats and similar specialty watercraft.

Under the provisions of this section it would appear that rowboats and canoes without motors, sailboats that are less than 10 feet in length, airboats and similar specialty watercraft are only required to carry a white lighting device which must be displayed in sufficient time to avoid a collision with another vessel.

It would therefore appear that "motorboats of Classes A and 1, when propelled by sail alone" would include small sailboats between 10 feet and 16 feet that are equipped with motors in excess of 10 horsepower. The lighting requirements depend primarily upon the means of propulsion. If the boat is being propelled by motor in excess of 10 horsepower, then the provisions of §371.57(1)(b), F. S., would govern the type of lights required. However, if the boat is equipped with a motor in excess of 10 horsepower and is being propelled by sail alone, then the lighting requirements as specified in §371.57(7)(a), F. S., would govern. Small sailboats under 16 feet in length for which

the only means of propulsion is natural forces, such as wind, are governed, insofar as lights are concerned, by the provisions of §371.57-(7)(b), F. S. Rowboats and canoes without motors and sailboats less than 10 feet in length, airboats and similar watercraft insofar as lighting requirements are concerned are regulated and governed by the provisions of §371.57(7)(b). Your question is therefore answered accordingly.

067-91—December 28, 1967

SOVEREIGNTY LANDS

RE TRUSTEES OF THE INTERNAL IMPROVEMENT FUND AND LOCAL POLITICAL SUBDIVISIONS REQUIREMENTS IN REGARD TO THE SALE, BULKHEADING AND DREDGING OF SOVEREIGNTY LANDS—EXTENT OF REPEAL OF §253.135(3), F. S. BY CH. 67-393, LAWS OF FLORIDA

To: *Robert C. Parker, Director, Trustees of Internal Improvement Fund, Tallahassee*

QUESTION:

Do the provisions of §§253.122, 253.123, 253.124, and 253.126, F. S., Ch. 67-393, Laws of Florida, or any part thereof apply to Monroe County in view of the exemption contained in §253.135-(3), F. S., enacted in 1957?

As stated in your letter, Ch. 67-393, Laws of Florida, the Randell Bill, amended §§253.12, 253.122, 253.123, 253.124, and 253.126, F. S., imposing new requirements upon the trustees of the internal improvement fund and local political subdivisions with regard to the sale, bulkheading, and dredging of state sovereignty lands. All of these sections had been enacted in their original form in 1957 by Ch. 57-362, Laws of Florida, commonly known as the "Bulkhead Act." Among the provisions of the 1957 Bulkhead Act was the exemption extended to Monroe County in §253.135(3), from the provisions of §§253.122-253.128.

The Randell amendments to the Bulkhead Act which passed this session include §253.126(1), F. S., which reads as follows:

253.126 Legislative intent.—

(1) The limitations and restrictions imposed by this chapter as amended by chapter 67-393 upon the construction of islands or the extension or addition to existing lands or islands bordering on or being in the navigable waters, as defined in §253.12, shall apply to the state, its agencies and to all political subdivisions and governmental units. No other general or special act shall operate to grant exceptions to this section unless this section is specifically repealed thereby.

The phrase "all political subdivisions and governmental units" clearly includes all counties of the state, including Monroe, and the limitations imposed "upon the construction of islands" and the "addition to existing lands" referred to in the new law are clearly those limitations on dredging and filling in §§253.123 and 253.124, F. S., which explicitly by their terms deal with "the construction of islands" and the "addition of existing lands." There appears, therefore, to be obvious conflict between §253.126 of the 1967 law requiring all counties to comply with the dredge and fill limitations of the chapter and the provisions of

§253.135(3), F. S., of the previous Bulkhead Act which exempted Monroe County from the provisions of said §§253.123 and 253.124 of the same chapter.

It must be noted at the outset that it is well-settled law in this state that the courts will presume statutes to be enacted with knowledge of prior existing laws and in cases of possible conflict between two statutes will favor a construction which allows each a field of operation, if possible, rather than construing one as meaningless or as repealed by implication. *State Department of Public Welfare v. Galilean Children's Home*, 102 So.2d 398 (Fla. App. 1958). Florida Jurisprudence adds to this rule:

In determining whether an intent on the part of the legislature to repeal a previous statute should be applied, the court should consider, primarily, the language of the statute itself, and, in addition, such factors as the nature of the statute in its field of operation, the history of pertinent legislation, including legislative history, and the problem sought to be remedied by the enactment. (30 Fla. Jur. Statutes, Section 154.)

If two laws or sections of a law are irreconcilably in conflict, the general rule is that the latest expression of the legislature prevails. *Johnson v. State*, 27 So.2d 276 (1946), *cert. den.* 329 U. S. 799, 91 L. Ed. 683, 67 Sup. Ct. 491. *State v. Board of Public Instruction*, 113 So.2d 368 (1959).

One construction of the language of the new §253.126, F. S., would have the limitations apply to all applications for construction, private as well as governmental, within Monroe County. The words "apply to . . . all political subdivisions" would be broadly construed to include a procedural as well as a substantive application to the county.

However, the plain meaning of the new section makes the dredge restrictions "apply to . . . governmental units" not private parties. Further, its language is not as pervasive as in the former exemption granted Monroe County, indicating it does not apply to all provisions of the dredge law, such as, for example, those pertaining to private parties. The language applies the "limitations" of the dredge laws "to . . . governmental units." It does not in a blanket manner apply the "provisions" of the dredge laws, to use the term of the earlier exemption. To bring Monroe County under all of these provisions would require more inclusive language than has been utilized by the legislature in the new act.

Furthermore, the history of the legislation and "the problem sought to be remedied by the enactment," clearly support the above construction. The 1967 amendment to §253.126, F. S., replaced earlier language which granted a clear exemption to the state, counties and "other political subdivisions" from dredge restrictions only when the construction was by these governmental units on behalf of themselves for a public purpose. The 1967 amendment retained much of the original language of the section but stated that the dredge restrictions shall apply rather than "shall not apply to the state" and "all political subdivisions." The intent was clearly to repeal the specific exemption of prior §253.126 in unmistakable terms as well as any general or special act granting a similar exemption. It would not be in accord with the rules of construction stated above to interpret the new law as repealing a broader scope of statutes absent an express and specific intent so to do. Repeals by implication are not favored. (30 Fla. Jur., Statutes, §153.)

Representatives of this office who worked closely in a legal capacity with committees of the legislature debating and drafting the section

which is the subject of this inquiry report that no intent was expressed which demonstrated a purpose in the new law to go beyond the scope of the old §253.126 which it replaced. The feeling was expressed by a number of legislators that counties, acting for themselves in a governmental or proprietary capacity, should not retain their exemption from the conservation provisions which the new act sought to impose. There was no reference known to this office, however, to the broader specific Monroe County exemption and the question of repealing those procedures utilized many years by that county in granting dredge and fill applications to third parties. It must be remembered that third party applications are already covered, as to other counties, in remaining sections of the law.

In view of the foregoing rules of construction, wording of the subject act and legislative history, I am compelled to the conclusion that §253.126, F. S., of the new Randell Act, Ch. 67-393, Laws of Florida, does make all of the limitations of that law regarding the construction or addition to lands bordering upon the navigable waters of the state, as set out in the act, applicable to Monroe County when it is acting in behalf of itself in either a governmental or proprietary capacity. The amendatory language of the new §253.126, F. S., together with the history of the statute and the legislative history, does not indicate, however, an intent to repeal by implication the broader aspects of the prior exemption granted to Monroe County in §253.135(3), F. S.

067-92—December 29, 1967

DEPARTMENT OF PUBLIC SAFETY

INSPECTION OF AUTOMOBILES PURSUANT TO CH. 67-307, LAWS OF FLORIDA (§§325.11-325.32, F. S.)—LIMITATION ON AUTHORITY OF NEW AND USED CAR DEALERS

To: *H. N. Kirkman, Director, Department of Public Safety, Tallahassee*

QUESTIONS:

1. May a new car dealer qualify as a self inspector as defined in this act for the purpose of inspecting new cars of his dealership which are to be sold to prospective buyers?
2. May a used car dealer qualify as a self inspector for the purpose of inspecting the used vehicles owned by him which are to be sold to a prospective buyer?
3. Should the answer to questions 1 or 2 be answered in the affirmative, would the department be correct in requiring the new or used car dealers to install the basic type of inspection equipment which will be required of the county or privately-operated facilities in order to insure that the equipment to be inspected meets the standards required under the act or promulgated by the director with the approval of the executive board?

An examination of the provisions of Ch. 67-307, Laws of Florida, would appear to indicate that it was the intent and purpose of the legislature to reduce traffic accidents due to faulty motor vehicle equipment by requiring all motor vehicles that are registered or required to be registered in Florida when operated upon the streets and highways to pass a statewide supervised uniform safety equipment inspection.

There can be no question but that the ever-increasing motor vehicle accidents and fatality rates in Florida and our sister states deserve and demand that every lawful and reasonable method be utilized in order to make our streets and highways safer places upon which to travel. Section 325.11(14), F. S., defines a "self inspector" as:

SELF INSPECTOR.—Any natural person, firm, copartnership, association, corporation, county, or other governmental entity owning or operating at least five vehicles, designated by the director for the purpose of inspecting vehicles. Self inspectors so designated of firms, persons, copartnerships, associations, or corporations may inspect only such vehicles owned or operated by them.

Subsection (1)(n) as originally contained in House Bill No. 164, introduced and read for the first time April 10, 1967, provides:

Self inspector.—Any natural person, firm, copartnership, association or corporation so designated by the director for the purpose of inspecting vehicles owned or operated by such person, firm, copartnership, association or corporation.

Thus, we see that by a committee substitute "self inspectors" were required to own or operate at least five vehicles. Thus, eligibility as a self inspector was made stricter. Section 325.14, F. S., reads in part as follows:

Sale of used motor vehicles.—No person engaged in the business of buying or selling new or used motor vehicles shall sell at retail any used motor vehicle which does not have affixed thereto a current approved inspection certificate as required under §325.12.

Section 325.15, F. S., reads in part as follows:

Time limit for inspection of newly registered motor vehicles.—The purchaser of any new motor vehicle or the owner of any motor vehicle brought into this state for the first time and which is required to be registered under the provisions of chapter 320, and required to be inspected under the provisions of §325.12 may operate any such vehicle or allow it to be operated on the streets or highways of the state, without inspection for not more than ten days from the date of purchase or from the date on which it was first brought into this state.

However subsections (4) and (5) as originally introduced as House Bill No. 164 read as follows:

(4) **DEALERS, INSPECTION OF USED MOTOR VEHICLES.**—On and after April 1, 1968, all motor vehicle dealers licensed within the state of Florida shall, prior to retail sale of used motor vehicles, have such motor vehicle inspected by an approved inspection station, unless such dealer shall be a self inspector, and have affixed thereto an approved inspection certificate as required under this section.

(5) **TIME LIMIT FOR INSPECTION OF NEWLY REGISTERED MOTOR VEHICLES.**—Except as provided in subsection (4) above, the purchaser of any new or used motor vehicle required to be inspected under this section, or of a vehicle brought into this state and required to be registered under the provisions of chapter 320, Florida Statutes, or any motor vehicle registered for the year 1968, and for which a registra-

tion plate is issued, on or after April 1, 1968, may operate such vehicle or allow it to be operated on the streets or highways of the state of Florida without inspection for not more than ten (10) days from the date of purchase.

An examination of these provisos as originally introduced and as finally passed by the legislature reveals that they underwent many changes. The title to subsection (4) has been changed and any reference in subsections (4) and (5) as to dealers being self inspectors was eliminated. Section 325.21, F. S., provides under the title "self inspectors" as follows: "Self inspectors.—The director may designate any governmental entity, person, firm or corporation as self inspectors, to carry out the provisions of §325.11(14) of this part."

The original provision pertaining to "self inspectors" is found in subsection (9) of House Bill No. 164 and provides as follows:

SELF INSPECTORS.—The director may designate the state or any political subdivision thereof or any person, firm or corporation as self inspectors for the sole purpose of inspecting vehicles owned or operated by such agencies, firms, or corporations so designated.

It would appear that your question depends upon the intent of the legislature as contained in the wording of §§325.11(14), 325.14, 325.15, and 325.21, F. S. Section (11) provides that the director may designate self inspectors. This is a permissive authority and not a mandatory command. However, in exercising this authority, the director is controlled by the provisions of §325.11(14) which require the person, firm, etc. to own or operate at least 5 vehicles. The mere fact that persons may meet the requirements as "self inspectors" does not in and of itself mean that the director shall grant and designate them inspectors. This discretion is left to the wisdom and judgment of the director by the legislature when they specifically provided that "The Director may designate" self inspectors.

The requirements of owning at least 5 vehicles would appear to apply to those vehicles which are titled in the name of the self inspector and actually used in the maintenance or pleasure of the self inspector and would not include those vehicles held by a new dealer under a floor plan mortgage arrangement for the sole purpose of sale. Neither would it appear to apply to those used vehicles not titled in the name of the used car dealer, and held solely for the purpose of resale. It would appear to require that the vehicle, in some manner, whether for social or business purpose, be titled and used by the person claiming to be a self inspector or applying for a self inspector permit. Obviously, it was the intent of the legislature to permit the appointment of self inspector to those owning and operating large fleets of vehicles in their business. As written, the "operating at least five vehicles" would appear to apply to those who have control of and operate large fleets of leased vehicles.

The legislature has carefully removed from the original bill as introduced any mention or reference to new and used car dealers being self inspectors and has explicitly required that no used car dealer shall sell at retail any used motor vehicle that does not have affixed thereto a current approved inspection certificate. In regard to the sale of new cars, the legislature has given the purchaser of any new motor vehicle 10 days from the date of purchase to have it inspected, clearly indicating that new car dealers could not be self inspectors. If new car dealers cannot be self inspectors, there certainly would appear to be no logic or reason to authorize used car dealers to be self inspectors of their

motor vehicles held solely for resale. Therefore, a new car dealer or a used car dealer cannot use motor vehicles held by him for sale or resale as part of the 5 or more vehicles, which must be owned or operated, in making application as a self inspector. In those instances wherein either a new or used car dealer does own or operate at least 5 or more vehicles in his business and he is authorized and designated as a self inspector, the inspection is limited to the 5 or more vehicles owned or operated in the performance of the business and would not include those vehicles held for the purpose of sale or resale. Questions 1 and 2 are answered accordingly.

Inasmuch as the director is required to cause periodic checks to be made in order to determine that inspections are being conducted in accordance with the provisions of Ch. 67-307, Laws of Florida (Part II, Ch. 325, F. S.), it would appear that inspection equipment should be uniform throughout the state, regardless of whether the inspection is conducted at a public inspection station or by a designated "self inspector" and question 3 is answered accordingly.

068-1—January 5, 1968

TAXATION

EXEMPTION—RENTAL OF HOMESTEAD BY SERVICEMEN— ABANDONMENT—§192.141, F. S., AS AMENDED BY CH. 67-459, LAWS OF FLORIDA

To: William L. Gibson, State Representative, Orlando

QUESTION:

Is it necessary in order to be entitled to the benefits of Ch. 67-459, Laws of Florida, that the servicemen who are either drafted or volunteer for service had previously qualified for homestead exemption as civilians?

Your question is answered in the negative.

Chapter 67-459, Laws of Florida, amends §192.141, F. S. Said section has its history in Ch. 59-270, Laws of Florida.

The title to Ch. 59-270, Laws of Florida, after first pointing out that Ch. 192, F. S., was amended by adding the entire section, to wit, §192.141, F. S., states ". . . The rental of an entire dwelling *previously claimed* to be a homestead . . . the abandonment of said dwelling as a homestead. . . ." (Emphasis supplied.) Neither the title to said law nor the body of the act contains any language indicating that the homestead must have been claimed by a serviceman as a civilian. Section 192.141, F. S., contains nothing which would indicate that it is necessary that the entire dwelling must previously have been claimed as a homestead by a serviceman as a civilian.

Chapter 67-459, Laws of Florida, (§192.141, F. S.) simply extended the benefits of this section by providing:

. . . [P]rovided further, the provisions of this section shall not apply to a member of the armed forces of the United States whose service in such forces is the result of a mandatory obligation imposed by the federal selective service act or one who volunteers for service as a member of the armed forces of the United States. . . . (Emphasis supplied.)

Note that this merely extends the provisions of §192.141, F. S., to persons who volunteer for service as members of the armed forces of

the United States. It does not state that it is to be limited to solely situations where the person who volunteered previously claimed a homestead exemption in Florida in his capacity as a civilian. The purpose seems to be to provide the benefits of said section to all members of the armed services who had claimed a homestead exemption in the state and then by reason of the fact that such persons were members of the armed services were compelled to move to other states or overseas. It provides that such a rental of the homestead by the serviceman in question would not constitute an abandonment. It should be construed as extending to all servicemen who had previously claimed a homestead exemption for tax purposes and been found to be entitled thereto under §7, Art. X, State Const., and the related laws found in Ch. 192, F. S. In this connection it should be remembered that citizenship is not a prerequisite to one's being entitled to a homestead tax exemption. See *Juarro v. McNayr*, 157 So.2d 79.

068-2—January 8, 1968

**COMMERCIAL RESTRICTION STATUTES
APPLICATION OF FICTITIOUS NAME LAW
TO CORPORATIONS—§865.09, F. S.**

To: Tom Adams, Secretary of State, Tallahassee

QUESTIONS:

1. Must a corporation doing business under a fictitious name register under the provisions of the fictitious name act as amended by Ch. 67-209, Laws of Florida?

2. Must a corporation doing business in the name under which it was incorporated and licensed to do business register under the provisions of the fictitious name act as amended by Ch. 67-209, Laws of Florida?

Section 865.09, F. S., more commonly known as the fictitious name act, (as amended by Ch. 67-209, Laws of Florida), now provides:

865.09 Fictitious name statute; definitions; etc.—

* * * * *

(2) (a) "Persons" shall include every individual, whether natural or artificial, firm or group or combination of individuals or partnerships, whether natural or representative.

(b) "Fictitious names" shall include any trade name, whether a single name or a group of names, other than the proper name or known called names of those persons engaged in such business or professions.

(c) "Business" shall include all enterprises or adventures wherein persons either sell, buy, exchange, barter or deal, or any of these things, or represent the dealing in anything or article of value, or rendering services for compensation.

Section 865.09(3), F. S., has always provided: "It shall be unlawful for any person or persons, as defined herein, to engage in business as herein defined, under a fictitious name"

Prior to the amendment of the statute it was somewhat confusing in that it was made applicable to artificial persons as is now the case but corporations were excepted leading to some confusion which prompted

the issuance of AGO 050-379, of the 1949-1950 Biennial Report of the Attorney General. In that opinion the attorney general said: "... I know of no other entity than corporations, except perhaps bodies politic, which are within a definition of 'artificial individual' (see 4 Words and Phrases 282)" Thereafter the opinion concluded that the fictitious name act was applicable to corporations doing business under a name other than the one under which they were incorporated notwithstanding the language that corporations were exempted from the act.

Now that the exemption provision pertaining to corporations has been removed from the fictitious name act there can be no doubt but that a corporation doing business under a name other than its corporate charter name must register under the fictitious name act. Question 1 is answered in the affirmative.

Under the definition provision of the fictitious name act and §1.01(3), F. S., there is no distinction between natural and artificial persons or corporate entities. Since there is no requirement that a natural person must qualify under §865.09, F. S., when doing business under his own name it apodictically follows from the very terms of the definition section of the fictitious name act that a corporation doing business under its charter name need not qualify under the fictitious name act as amended. Question 2 is answered in the negative.

068-3—January 9, 1968

LEON-WAKULLA PORT AUTHORITY

FINANCING—LAND ACQUISITION, BORROWING AND FISCAL YEAR

To: *William P. Malloy, Chairman, Leon-Wakulla Port Authority,
Tallahassee*

QUESTIONS:

1. Does Ch. 67-499, Laws of Florida, amending Ch. 315, F. S., the 1959 Port Facilities Financing Law, supersede Ch. 67-902, Laws of Florida, establishing the Leon-Wakulla Port Authority, to the extent of any conflict?

2. Does the Leon-Wakulla Port Authority have the power under the provisions of Chs. 67-499 (§315.15, F. S.) and 67-902, Laws of Florida, to borrow money for land acquisition and administrative expenses and, if so, is a referendum necessary?

3. May borrowed funds be used for land acquisition and administrative expenses?

4. May the Leon-Wakulla Port Authority repay the principal and interest on loans from the levy of the one mill ad valorem tax authorized under the provisions of section 3, subsection (8) of Ch. 67-902, Laws of Florida?

5. Does Ch. 67-499, Laws of Florida, amending Ch. 315, F. S., broaden the provisions of Ch. 67-902, Laws of Florida, creating the Leon-Wakulla Port Authority, to the extent of eliminating the necessity of a referendum?

6a. Do the provisions of §215.01, F. S., restrict the Leon-Wakulla Port Authority in establishing a fiscal year?

b. Conditioned upon an affirmative answer to question 6a., may funds be borrowed on January 1 of the tax year in anticipation of taxes levied on that date which will not be collected until later in the same year?

7. What is the authority of the Leon-Wakulla Port Authority to execute a mortgage or purchase land subject to a mortgage?

AS TO QUESTION 1:

Chapter 67-499, Laws of Florida, (§315.15, F. S.) by its own terms may be implemented notwithstanding any other general, special or local law concerning the issuance of bonds "... and *without regard to the requirements, restrictions or procedural provisions contained in any other law*, either general, special or local." Chapter 67-499 cannot, however, supersede the provisions of Ch. 67-902, section 3, subsection (7), Laws of Florida, which contains the proviso "that the full faith and credit of the counties not be pledged unless approved in a referendum by its electors." This proviso stems from the organic provisions of §6, Art. IX, State Const.

AS TO QUESTION 2:

It would appear that the Leon-Wakulla Port Authority has the power to borrow money for land acquisition and its administrative expenses under the provisions of the special act creating the port authority, Ch. 67-902, section 3, subsections (6), (7) and (11), Laws of Florida, as well as under the provisions of §§315.02(7) and 315.03(15) and (16), F. S. A referendum would be necessary if the credit of the counties within the port authority was pledged in view of the provisions of §6, Art. IX, State Const., and Ch. 67-902, section 3, subsection (7). Should the port authority contemplate the acquisition of land on a lease-purchase arrangement I would direct your attention to the observations in the enclosed copy of AGO 058-164, p. 692 of the 1957-1958 Biennial Report of the Attorney General.

AS TO QUESTION 3:

It would appear that the provisions of Ch. 67-902, section 3, subsections (6), (7), and (11), Laws of Florida, as well as the provisions of §§315.02(7) and 315.03(15), F. S., authorize the use of port authority funds, either borrowed or otherwise, for administrative expenses and land acquisition. I believe these references provide the answer to question 3.

AS TO QUESTION 4:

Chapter 67-902, section 3, subsection (8), Laws of Florida, authorizes the levy of a one mill tax "in order to pay appropriations permitted by this act." Since the act in section 3, subsection (7) authorizes the port authority "to borrow money to carry out its lawful purposes" it would appear that the tax levied under the provisions of section 3, subsection (8) could be used to pay the principal and interest on any lawful debt of the port authority. These observations answer question 4 in the affirmative.

AS TO QUESTION 5:

As explained in the answer to question 1 above, a referendum may not be avoided if the credit of the counties in which the port authority is situated is pledged in view of the constitutional restriction found in §6, Art. IX, State Const.

AS TO QUESTION 6a:

Section 215.01, F. S., was originally enacted as a part of the 1853 State Appropriations Act under the provisions of Ch. 515, Laws of Florida, 1853, and was applicable to state appropriations only. In *State ex rel., Brosnahan, et al. v. Cone, et al.*, 140 Fla. 657, 192 So. 797, p. 802, the court, after quoting the statutory language now found in §215.01, F. S., said: "the above statutory designation of the fiscal year is applicable to State officials and their duties unless otherwise specifically pro-

vided." This would indicate that §215.01, F. S., is applicable to state appropriations only since there is no provision for its application to political subdivisions such as the Leon-Wakulla Port Authority created under the provisions of Ch. 67-902, Laws of Florida.

Accordingly, the Board of the Leon-Wakulla Port Authority is, in absence of any restrictions in Ch. 67-902, Laws of Florida, authorized to establish a fiscal year of its own choosing and is not restricted by the provisions of §215.01, F. S.

AS TO QUESTION 6b:

In *State v. City of Miami*, 150 Fla. 270, 7 So.2d 146, the court said at p. 151:

. . . It has been generally held that contracts for the payment of *current* county or municipal expenses do not come within the constitutional or statutory prohibition against the incurring of county or municipal indebtedness whether such contracts run for a period of one year or for several years provided the revenues which will be available annually to the county or municipality are found to be sufficient to meet the current expenses including amounts to become due under such contract. See *Leon County v. State*, supra; [122 Fla. 505, 165 So. 666] *Hathaway v. Monroe*, 97 Fla. 28, 119 So. 149; *Tapers v. Pichard*, 124 Fla. 549, 169 So. 39; *Posey v. Wakulla County*, Fla., 3 So.2d 799. . . . (Emphasis supplied.)

See also *Ginsberg v. City of Daytona Beach*, 103 Fla. 168, 137 So. 253, p. 254, in which the court held that a note executed in Dec., 1929 which became due on or before Jan. 1, 1931, and discharged in April, 1931, was nothing more than the evidence of a debt and did not occupy the status and distinction of a bond within the class of obligations covered by the provisions of §6, Art. IX, State Const., as amended in 1930.

Accordingly, it would appear that the port authority may borrow money in anticipation of revenues to be received during the current budget year.

AS TO QUESTION 7:

In *Broward County Port Authority v. State*, 129 Fla. 73, 175 So. 796, p. 802, the Supreme Court of Florida, in a bond validation proceeding refused to allow the Broward County Port Authority (Port Everglades) to mortgage the land upon which a warehouse was situated without a referendum as being in violation of the provisions of §6, Art. IX, State Const.

In *Hollywood, Inc. v. Broward County, Fla.*, 90 So.2d 47, the Supreme Court of Florida, in citing the Broward County Port Authority case, *supra*, held (see syllabus of court) "that where county (or a political subdivision) acquires property (without referendum) subject to mortgage, mortgage becomes charge against property and county (or political subdivision) is placed in position of being coerced to meet annual requirements for interest and maturing principal under mortgage, and there is a violation of intent of constitutional inhibition against creating indebtedness without consent of freeholders." To the same effect see the observations at 26 Fla. Jur. 391, *Public Securities and Obligations*, §60.

Accordingly, your question as to the authority of the port authority to execute mortgages or purchase land subject to mortgages may be answered in the affirmative conditioned upon the prerequisite of a freeholder referendum as required by the provisions of §6, Art. IX, State

Const. In the absence of such a referendum, public property may not be mortgaged. These observations are not intended to suggest that the port authority cannot issue revenue certificates pledged against the income of the port authority without the necessity of freeholder approval. In such instances the anticipated income rather than a mortgage on the realty of the port authority would serve as security for the notes or certificates. In this regard I direct your attention to *Panama City v. State*, 93 So.2d 608 p. 614.

068-4—January 9, 1968

ST. MARKS PORT AUTHORITY

ESTABLISHMENT PURSUANT TO GENERAL ENABLING ACT (CH. 315, F. S.)—AUTHORITY WHEN SITUATED WITHIN BOUNDARIES OF LEON-WAKULLA PORT AUTHORITY CREATED BY SPECIAL ACT (CH. 67-902, LAWS OF FLORIDA)

To: *Donald L. Tucker, Town Attorney, St. Marks*

QUESTION:

What effect would Ch. 67-902, Laws of Florida, a special law, creating the Leon-Wakulla Port Authority have upon rights and powers of the St. Marks Port Authority created previously pursuant to Ch. 315, F. S.?

It appears from your letter that the port authority for the Town of St. Marks was established under charter authority which grants to the town authority to exercise all powers and rights available under the general law. Chapter 315, F. S., known as the 1959 Port Facilities Financing Law, provides in §315.02(2) that a board of county commissioners may act as a port authority and further implies that a municipality as a district may also create a port authority within the municipality.

It is noted the Supreme Court of Florida, in discussing a port authority created similarly by the Board of County Commissioners of Manatee County held in *State v. Manatee County Port Authority*, 171 So.2d 169, p. 170, that:

... When a board of county commissioners constitutes itself into a Port Authority under the act, it does not thereby purport to bring into being an autonomous governmental unit. The Manatee County Port Authority is not a separate political subdivision. It is, in reality, merely the Board of County Commissioners functioning under a different name for administrative purposes. ...

This being the case, it would seem to follow that the Town of St. Marks, situated in Wakulla County, by the act of establishing a port authority under Ch. 315, F. S., has not created an autonomous body or separate political subdivision, but is simply the Town of St. Marks acting under another name. Thus the Port Authority of the Town of St. Marks stands in no better position than any other municipality within the 2-county area encompassed by the Leon-Wakulla Port Authority. Under the provisions of section 3, Ch. 67-902, Laws of Florida, the Leon-Wakulla Port Authority has the authority to acquire land and facilities, including the right to vacate or condemn streets and roads, other than state or United States highways, where the same may be necessary for the development of port facilities.

Since city streets are not state or U. S. highways, it would appear that the streets in St. Marks, and more specifically here, those in the area of the St. Marks Port Authority, would, like the streets in any other municipality within the Leon-Wakulla Port Authority, be subject to appropriation by the Leon-Wakulla Port Authority if they were necessary for the development of port facilities by that port authority.

It is further noted that §315.04, F. S., a part of the act under which the St. Marks Port Authority was created, provides:

... Any municipality located in a county authorized by law to operate port facilities or in which there is a port district or a port authority shall exercise any powers granted by this law *only* if the governing body of such county, port district or port authority shall by resolution determine that the best interests of the county will be served thereby and consent thereto.
... (Emphasis supplied.)

This provision would indicate that in order to exercise the powers under Ch. 315, F. S., the St. Marks Port Authority would first have to obtain by resolution the consent of the Leon-Wakulla Port Authority which was established by special act.

To answer your question in summary, it would appear that the St. Marks Port Authority can only exercise powers granted under Ch. 315, F. S., with the consent of the Leon-Wakulla Port Authority. Even upon the granting of this consent by the Leon-Wakulla Port Authority it would still have the right to acquire by condemnation or other appropriate proceedings such property of the St. Marks Port Authority as might be needed for port facilities by the Leon-Wakulla Port Authority.

068-5—January 11, 1968

PUBLIC RECORDS

SCRIVENER'S ACT—DEFINITION OF "PERSON"; DETERMINATION OF PERSON PREPARING INSTRUMENT; PROHIBITION AGAINST RECORDATION BY CLERK

To: *Arthur H. Beckwith, Jr., President, State Association of Clerks of the Circuit Courts, Sanford*

QUESTIONS:

1. Should the word "person" appearing in §695.24(1), F. S., be interpreted to include corporations and associations?

2. What determines who prepared an instrument under §695.24, F. S.?

3. Should a document be recorded where the prerequisites imposed by §695.24, F. S., are not met?

Section 695.24, F. S., provides in part:

(1) No instrument by which the title to real estate or any interest therein or lien thereon is conveyed, created, encumbered, assigned or otherwise disposed of shall be recorded by the clerk of the circuit court of any county of this state unless the name and address of the person who prepared such instrument is printed, typewritten or stamped on the face thereof in a legible manner. An instrument complies with this section if it contains a statement in substantially the following form:

"This instrument was prepared by

(name)

(address)

_____,"
 (2) This section does not apply to any instrument executed before the effective date of this section, nor to the following:

- (a) A decree, order, judgment or writ of any court;
- (b) A death certificate;
- (c) An instrument executed or acknowledged outside of this state.

AS TO QUESTION 1:

It is a general rule of statutory construction that a state by adopting statutes of another state adopts the construction which has been given the statute by such other state. See *Duval v. Hunt*, 34 Fla. 85, 15 So. 856, and *Denmark v. Ridgell Furniture Co.*, 117 Fla. 244, 157 So. 489.

Inquiries concerning the introduction of the Scrivener's Act reveal that it was patterned after similar acts of the states of Indiana and Ohio and there are opinions of the attorneys general of each state on this subject. Ohio has a statute like §1.01(3), F. S., Indiana does not. Based on this distinction the Indiana Attorney General in his Opinion No. 26, dated Jan. 29, 1959, concluded that the word "person" does not apply to corporations. On the other hand the Ohio Attorney General in his Opinion 5806 dated Sept. 30, 1955, said:

We may next consider the meaning of the word "person" as used in this statute. It would seem that the object of this legislation is twofold, i.e., to afford information which would disclose instances of the unauthorized practice of law, and to fix the responsibility for such defects in instruments which may later become evident. I do not consider that we are here concerned with any question of what constitutes the unauthorized practice of law, for the statute in question is directed solely at the disclosure of the identity of persons who prepare instruments, rather than the regulation of their activities. Such disclosure would, of course, be more or less ineffectual unless the natural person concerned were named in the instrument.

However, in Section 1.02, Revised Code, it is provided: "As used in the Revised Code, unless the context otherwise requires. . . (B) 'Person' includes a private corporation. . . ."

It is to be presumed that the legislature selects the language employed in new enactments with knowledge of existing statutory definitions, and where words defined by general statutory provisions are employed in new enactments, they are used in the sense thus indicated; and that if such is not the legislative intent, that intent will be evidenced either expressly or by the clearest sort of implication. (It has been held in Florida that the legislature in enacting a statute presumably acts with full knowledge of existing statutes. See *Tamiami Trail Tours v. Lee*, 142 Fla. 68, 194 So. 305, and *Collins Investment Co. v. Metropolitan Dade Co.* Fla., 164 So.2d 806.)

I preceive [sic] nothing in the context in which the term "person" is used in Section 317.111, Revised Code, which requires the adoption of a meaning other than that thus prescribed by statute. Quite clearly a mere suggestion or implication in such context would not be sufficient to avoid the application of this statutory definition. The use of the word "requires," in my opinion, makes it necessary that the context be such that the statutory definition is impossible of application therein, if

such definition is not to be applied; and I am unable to conclude that the context in the instant case presents such impossibility.

It is inherent in the nature of corporations that they may act only through agents and it necessarily follows that where a corporate "person" has prepared an instrument for its own use, it is the name of the principal rather than that of the agent which should be disclosed thereon. There could be no objection in such case, of course, if the principal concerned should elect to disclose the name of its agent on such instrument but such disclosure does not appear to be required under the act.

As to the question of the use of the name of an agent followed by the words "agent of the A.B.C. Corporation," I perceive no objection to this practice under the statute here in question although such words would appear to be surplusage if the principal elects to disclose the agent's name rather than its own.

The Ohio facts and law being more nearly analogous to Florida's than that of Indiana I feel constrained to apply the construction of the Ohio Attorney General by concluding that §1.01(3), F. S., like Section 1.02 Revised Ohio Code, defining persons as corporations, requires that the word "person" in §695.24, F. S., contemplates artificial as well as natural persons so as to include corporations and associations. This appears to conform with the previous informal expressions of this office making reference to §1.01(3), F. S., and I am therefore inclined to answer question 1 in the affirmative.

It should be pointed out in passing that in statutory construction legislative intent is the pole star by which the courts and this office must be guided. See *Ervin v. Peninsular Telephone Co.*, Fla., 53 So.2d 647; *Smith v. Ryan*, Fla., 39 So.2d 281, and *Fla. State Racing Comm. v. McLaughlin*, Fla., 102 So.2d 574.

Although it does not appear from the face of the act that any other construction was intended, I have been advised that the opinion of the Indiana Attorney General was used as a guide by the framers of this legislation in drafting it and explaining it in legislative committees. There is some evidence, although it be unofficial, that it was the intent of the framers of the legislation to have it apply to natural persons only but that no such limitation was included in drafting the provisions of §1.01(3), F. S.

Regrettably, the rules of statutory construction require that the legislative intent be gathered from the words as promulgated in the act rather than from expressions of legislators or their committees. See *Douglas v. Webber*, 99 Fla. 755, 128 So. 613 p. 615, and *Marchese v. United States* 126 Fed. 2d 671. This accounts for the construction placed upon the statute here.

AS TO QUESTION 2:

In answer to question 2, the Ohio Attorney General said:

The preparation of a legal instrument may involve only a single step, as when it is drafted in its entirety by one person or it may involve the drafting of a form which is thereafter reproduced by printing, the filling in of such form by the addition of names, numbers, dates[,] descriptions of property, and the like. There is, therefore, a question for decision in any such case of the precise point at which the writing can be deemed ready for use by the parties. Obviously this decision can be made either by the party concerned, or by someone acting on his behalf. In

the case of a corporation, such determination must necessarily be made by an agent. In the ordinary situation, where an instrument is drafted in its entirety, it is the individual who decides upon the language to be employed therein, who makes the decision that it is ready for execution. In other situations, where printed forms are used, the decision that a particular writing is ready for use, i.e., for execution by the parties, involves not only the selection of a particular form, but the selection of suitable language to be added thereto. In either case, it is my view that whoever makes these selections, whether acting on his own behalf or as the agent of another, is the individual who has "prepared" the instrument concerned.

This conclusion is sufficient to dispose of the query as to the part of the typist or stenographer in the preparation process, for it is evident that these individuals are mere scriveners or amanuenses of the persons who have actually selected the language to be employed. They cannot be regarded, therefore, as having "prepared" an instrument where their sole contribution has been the physical task of writing or typing it. (The Florida Courts have held that with regard to real estate transactions the preparation and execution of the instruments effectuating the transfer should be under the lawyer's supervision, if the parties decide that they need expert advice and service. See *Keyes Co. v. Dade County Bar Assoc.*, 46 So.2d 605 p. 606; *Cooperman v. West Coast Title Co.*, 75 So.2d 818, p. 821, and *Florida Bar v. McPhee*, 195 So.2d 552 p. 554.)

Based on the above and foregoing the Ohio Attorney General then concluded:

(1) An instrument is deemed to have been "prepared," as this term is used in Section 317.111, Revised Code, by the person or persons who have selected the language to be employed therein. Such selection may consist (1) in part in the selection of a particular printed form as one appropriate for the purpose, and (2) in part in the selection of the language to be employed in filling up (out) such form. Where two or more persons have collaborated in the selection of the language to be employed in an instrument, the names of all should appear thereon unless one of them is authorized to approve, and does approve, the final draft thereof, in which case such person is deemed to have prepared such instrument, and only his name need be disclosed thereon.

(2) A typist or stenographer whose sole contribution to the preparation of an instrument is the physical task of typing or writing the language selected by another is not deemed to have "prepared" such instrument within the meaning of Section 317.111, Revised Code.

(3) Section 317.111, Revised Code, requires the disclosure of the name of the person or persons who have drafted a particular instrument; and where only one member of a firm of attorneys has participated in such drafting, and the firm name is disclosed on such instrument, the name of such individual member also should appear thereon.

These observations are adopted as the opinion of the Attorney General here in Florida. Question 2 is answered accordingly.

AS TO QUESTION 3:

In answer to question 3 I again refer to the provisions of §695.24(1), F. S., which provide in part: "*No instrument . . . shall be recorded by the clerk of the circuit court of any county of this state unless. . .*" (Emphasis supplied.) This language would indicate that unless the requirements of §695.24, F. S., are met, the instrument should not be recorded by the clerk. I am inclined toward the position that no clerk could suffer any personal liability by refusing to record an instrument which does not meet the requirements of §695.24. In fact it would appear that if an instrument were recorded where the prerequisites of §695.24, had not been met there would be an improper and invalid recordation.

068-6—January 12, 1968

FLORIDA DEVELOPMENT COMMISSION

AUTHORITY OF COMMISSION'S EXECUTIVE DIRECTOR TO ENTER INTO CONTRACTS

To: *Louis Wolfson, II, Legislative Council, Miami*

QUESTION:

Under existing Florida Statutes, may the Executive Director of the Florida Development Commission enter into a contract obligating funds of the commission without approval by official action of the commission?

Your question is answered in the negative.

The state has the power to contract. The state is only a corporate name for all the citizens within its territorial limits. The people acting as a public corporation have a right to enter into contracts and make purchases, but in so doing they must act through some governmental agency. In the absence of constitutional restrictions, the legislature may delegate its authority to contract to boards and commissions, whose action in making contracts is the action of the state. See 49 Am. Jur. (States, etc.) 276, Sec. 63; 81 C.J.S. (States) 1084-1085, Sec. 112, 113.

The state has delegated the power to contract and be contracted with to the Florida Development Commission insofar as necessary to administer the duties within the scope of its lawful authority. Chapter 288, F. S., grants to and vests in the development commission the power to make and enter into such contracts as may be necessary in order to carry out the objectives and purposes of the statute. See §§288.06, 288.12, 288.13, 288.15, 288.24, and 288.27, F. S.

Where the state authorizes a certain officer or legal body to contract for it in regard to certain purposes and subjects, no other officer or agency can exercise the authority to contract relating to those purposes and subjects, nor exercise authority to ratify or give effect to a contract not actually made by the authorized person or body. The duty of doing and performing the essential things necessary to the creation of a contract and the acts which involve discretion cannot be delegated to another, but must be exercised by the authorized agent or agency of the state. Where the authority and power to contract is conferred upon a board or commission, such authority must be exercised by the board or commission as an entity. See *Charles Scribner's Sons v. Marrs*, State Supt. of Public Instruction (Tex. 1924), 262 S.W. 722, 728 (14); also see 81 C.J.S. (States) 1086-1087. The development commission as a body, and not its executive director, is the governing agency set up by law to administer Ch. 288, F. S. The sovereign power and

function of the commission to contract and be contracted with must be exercised through its board and not by its executive director, unless otherwise expressly provided by the statutes.

The powers and duties of the Executive Director of the Florida Development Commission are prescribed by §288.04, F. S., which provides that he is to "have general charge of the work of the commission" and that he shall appoint "such assistants, experts, technicians and clerical staff as the commission may deem necessary for the efficient conduct of its work." It thus appears that the primary function of the executive director is the carrying out of the commission's decisions and orders and to see to the execution of the same and the "work of the commission" for the accomplishment of the purposes and objectives of the commission and the provisions of the statute.

I find nothing in Ch. 288, F. S., which authorizes or empowers the executive director of the development commission to make or enter into any contract whatever for or in behalf of the commission or the state, or to exercise or perform any discretionary act or function of the commission. His authority is circumscribed and limited by the statutes. These can be searched in vain for any delegation of the contract power with reference to the duties and responsibilities vested by law in the commission or with respect to obligating funds of the commission or of the state.

I thus conclude that under existing law the Executive Director of the Florida Development Commission alone is without authority to make and enter into contracts obligating funds of the commission.

068-7—January 16, 1968

WELFARE

HOSPITAL CARE OF INDIGENT PERSONS—COSTS—HOSPITAL AND WELFARE BOARD OF HILLSBOROUGH COUNTY

To: *Richard S. Hodes, State Representative, Hillsborough County, Tampa*

QUESTION:

As used in sections 2 and 5 of Ch. 67-1498, Laws of Florida, what do the following terms mean: "medically indigent patient" "persons referred to the several hospitals and clinics by the welfare council and its agents"; "usual and regular charges" and "full cost of the hospital and related services rendered?"

Your main concern is with an interpretation of section 2 of Ch. 67-1498 which added section 10F to Ch. 63-1402, as amended, and section 5 of Ch. 67-1498 as it amended section 7, subsection (4) of Ch. 63-1402, all Laws of Florida, as amended, which read as follows:

Section 10F. The hospital and clinic facilities under the supervision of the hospital council shall be reimbursed all usual and regular charges for the medical and hospital treatment of all persons referred to the several hospitals or clinics by the welfare council or its agents.

Section 7. . . . (4). The full cost of any hospital or related services provided for medically indigent patient care shall be charged to welfare services and functions and shall be credited to hospital services and functions.

As I previously stated, these two statutory provisions appear in

the same statute, so that they are derived from the same enactment. Under these circumstances, the two provisions should be reconciled or harmonized so far as is practicable. (82 C.J.S. 714-717, §346.)

The confusion appears to lie in the fact that the following two terms are used to describe patients receiving hospital services: (1) persons referred to the several hospitals and clinics by the welfare council and its agents; and (2) the care of medically indigent patients. In that the term "medically indigent patient" sets up a classification which by its very nature would include "persons referred to the several hospitals and clinics by the welfare council and its agents," it would seem apparent that the "usual and regular charges" would in effect represent the "full cost of the hospital and related services rendered." It would seem that both of these terms must necessarily be construed to mean the normal charges made by a hospital for its room, board and other services necessary for the care and treatment of its patients.

068-8—January 19, 1968

TAXATION

ASSESSMENT AND COLLECTION—ERROR DUE TO ACTS OF OMISSION AND COMMISSION—CORRECTION

To: *Fred O. Dickinson, Jr., State Comptroller, Tallahassee*

STATEMENT OF FACTS:

After the 1967 Volusia County personal property tax roll was prepared, tax bills mailed pursuant to §193.45, F. S., and the distribution of the receipts commenced, certain shortages were noted.

Investigation by the tax collector determined that the shortages were the result of an error; to wit: tax penalties pursuant to §200.35, F. S., were computed at the rate of 1% rather than 10% as required by the statute.

It is not clear whether the error was the fault of the tax collector or her agents, the business firm that actually prepared the calculations pursuant to the tax collector's instructions, or even originated in the programming of the computers. If the latter occurred, then the errors appeared not only in the tax bills, but also in the tax roll itself, which would mean the error has extended to all penalties imposed under §200.35, F. S. Doubtless wherever the error originated, it was unintentional.

QUESTIONS:

1. Where through error, mechanical or otherwise, a penalty of 1%, instead of the 10% required by §200.35, F. S., was imposed, much of which has been collected by the tax collector and distributed according to statutory requirements, may the uncollected 9% penalty be now enforced?

2. Is the Volusia County Tax Assessor authorized to correct the 1967 personal property tax roll with respect to the penalties after its certification and delivery to the Volusia County Tax Collector?

3. If the corrections should be made by the Volusia County Tax Assessor, is the Volusia County Tax Collector required to mail out corrected bills?

4. As to the tax bills which have been paid by the respective taxpayers, are further collections precluded by the case of *Okeelanta Sugar Refinery, Inc., v. Maxwell*, Fla. 183 So.2d 567,

or may bills be sent out for the portion not previously collected?

5. If the corrected bills should be prepared, on which office should the expense of such preparation fall—the tax assessor's office or the tax collector's office?

Section 200.35, F. S., provides that:

... Any person who fails to make a tax return as required by this chapter shall pay as a penalty, in addition to and as part of the tax a sum equal to ten per cent of the tax found to be due. ...

A similar penalty is imposed by the same section on taxpayers who fail to include all their tangible personal property in their tax return. These provisions are clearly penalties, added to the ad valorem taxes due, for failure to pay the tax on time and for failure to return all taxable property for taxation.

Each such taxpayer paying such penalties was charged with knowledge that the penalty was 10% of the taxes levied and not 1% collected.

This section was held valid in *Tampa Gas Company v. Sparkman*, 153 Fla. 177, 14 So.2d 196, where the Supreme Court of Florida, in noting the duty of the legislature to provide sufficient funds to defray the expenses of the state said: "The mandatory duties invest the Legislature with power to levy taxes, and such power necessarily carries the power to vest reasonable penalties to insure the collections of same."

In this case the court drew a distinction between a monetary penalty based on the taxes imposed, as is the penalty imposed by said §200.35, F. S., and the increase of the tax valuation, as was the case in *Colonial Investment Co. v. Nolan*, 100 Fla. 1349, 131 So. 178, text 181 and 182. In *Tampa Gas Company v. Sparkman*, *supra*, the court, in referring to this case, said there is a difference between the two situations. In the *Tampa Gas Case*:

... [P]enalty does not augment the valuation. It is imposed for neglect to perform a duty. The legislature may require the owners of property to return their property for taxation. The property owner may avoid the penalty by discharging his lawful duty. So long as the penalty is not unreasonable or arbitrary it will be upheld.

I do not think that this case, being merely and only the levy of a penalty due, due to the failure to levy but 1% of a 10% penalty, is governed by that line of cases where additional tax valuations have been attempted to be levied after the taxes have been paid, such as *Florida National Bank v. Simpson*, Fla., 59 So.2d 751, text 755-757; *Okeelanta Sugar Refinery, Inc., v. Maxwell*, Fla. App., 183 So.2d 567 and authorities cited. In each of these cases the tax assessor had attempted to add tax valuation to assessments after the taxes on the original assessments had been completed and paid. Here we have a 10% penalty imposed by the legislature, which penalty, through errors of omission and commission, was imposed at the rate of 1%.

As to the authority of the legislature to impose such penalties, in addition to the *Tampa Gas Co. v. Sparkman*, *supra*, see also *First Trust and Savings Bank v. West Lake Investment*, 105 Fla. 590, 141 So. 394, text 895; 51 Am. Jur. 848, §970 and 85 C.J.S. 575, *et seq.*, §§1021-1023.

It was the duty of the tax assessor to prepare and extend a proper and legal tax roll, correctly imposing all tax assessments and penalties, and of the tax collector to send out proper and legal tax notices. It is

readily apparent that there have been acts of omission and of commission in preparing and extending the tangible personal property tax roll, and the sending out of tax bills, resulting in material loss to the county probably totaling "over \$30,000 for the entire (tangible personal) property tax roll." This was an error of omission or commission on the part of the taxing officials of the county within the provision in §192.21, F. S., that:

... No act of omission or commission on the part of any tax assessor, assistant tax assessor, tax collector, board of county commissioners ... shall operate to defeat the payment of said taxes; but any such acts of omission or commission may be corrected at any time by the officer or party responsible for the same in like manner as is now or may hereafter be provided by law for performing such acts in the first place ...

This statute is ample authority for correcting the error of omission or commission.

The theory of the tax roll is that it was prepared and completed by the county assessor of taxes as is required of him by law. It should be corrected by the said tax assessor by entering thereon the additional 9% penalties, not heretofore imposed, which corrected tax roll then completed should be delivered to the tax collector who should prepare and send out corrected tax notices.

AS TO QUESTION 1:

Question 1 is answered in the affirmative; the unassessed 9% of the penalty imposed by §200.35, F. S., remains unpaid, and should be enforced in the same manner as are the taxes imposed under Ch. 200, F. S.

AS TO QUESTION 2:

The items in the 1967 tangible personal property tax roll imposing a 1% penalty under §200.35, F. S., should be corrected by the tax assessor so as to include the unimposed 9% of the penalty, showing the paid and unpaid portions thereof. These corrections are authorized by §192.21, F. S., as errors of omission or commission.

AS TO QUESTION 3:

The tax assessor should correct the tax roll as aforesaid and return it to the tax collector who should open it for the collection of the additional penalties. Corrected bills should be mailed out by the tax collector.

AS TO QUESTION 4:

This case being the failure to impose the required statutory 10% penalty, but only imposing a 1% penalty, is not an attempted additional valuation of properties already assessed, as was the case in *Florida National Bank v. Simpson*, Fla., 59 So.2d 751, text 755-757; *Okeelanta Sugar Refinery, Inc., v. Maxwell*, Fla. App., 183 So.2d 567 and therefore not within the rule announced in said cases.

AS TO QUESTION 5:

Technically the office or person responsible for the error resulting in the imposition of only a 1% penalty, instead of the required 10% penalty, should bear the expense of the imposition of the additional 9% of the penalty imposed by the statutes.

068-9—January 19, 1968

PUBLIC SCHOOL SYSTEM

CONTINUING CONTRACTS—INSTRUCTIONAL PERSONNEL,
ADMINISTRATIVE PERSONNEL

To: Warren M. Briggs, State Representative, Escambia County,
Pensacola

STATEMENT OF FACTS:

Section 231.36, F. S., as it existed prior to 1967, required that "each person employed as a member of the instructional staff in any county school system or as a professional administrative or attendance assistant, supervisor or principal" should be properly certified and would be entitled to and receive a written contract. That section further provided that "each member of the instructional and administrative staff in each county school system" who met certain requirements, including the fulfillment of probationary service, would be entitled to a continuing contract.

The 1967 Session of the Legislature enacted Ch. 67-387, Laws of Florida, and by section 6 thereof amended the introductory paragraph of §231.36, F. S., to read in part as follows:

231.36 Contracts with instructional staff.—Each person employed as a member of the instructional staff in any county school system or as a supervisor or principal shall be properly certificated and shall be entitled to and shall receive a written contract . . . Each member of the instructional staff in each county school system [who meets certain qualifications] . . . shall be entitled to and shall be issued a continuing contract in such form as may be prescribed by regulations of the state board. . . .

Section 228.041(11), F. S., makes the following definition:

. . . **INSTRUCTIONAL PERSONNEL.**—Instructional personnel shall mean any certificated member of the instructional staff and shall be used synonymously with the word teacher and shall include supervisors, principals, teachers, librarians, and others engaged in an instructional capacity in the schools.

* * * * *

End of statement.

QUESTIONS: Based upon the above facts.

You express an interest in the present tenure status of professional administrative personnel, attendance assistants, supervisors and principals and relative thereto ask the following questions:

1. Do these personnel now hold tenure per the contracts they signed at the beginning of this school year?

2. If they are presently on tenure, does not their tenure in these positions expire no later than the end of this school year in accordance with §231.36, F. S., as revised?

3. Does not §231.36, F. S., eliminate tenure in the future for other than the instructional staff (classroom teachers)?

The total effect of section 6 of Ch. 67-387, Laws of Florida, was to eliminate "professional administrative or attendance assistant" from the certification requirements and to eliminate members of the "administrative staff" from entitlement to continuing contracts.

Your questions deal solely with tenure (continuing contracts). Prior to the 1967 amendment, tenure was grantable to members of the instructional staff and to members of the administrative staff. After the 1967 amendment, tenure was only grantable to members of the instructional staff.

Section 228.001, F. S., provides that all laws of Florida relating to public education shall be known as and shall comprise "The Florida School Code." Chapter 231, F. S., relates to public education and is, therefore, a part of "The Florida School Code." Section 228.041, F. S., provides specific definitions for certain words or terms, which definitions apply whenever such words or terms are used in "The Florida School Code."

Although §228.041, F. S., does not define the terms "instructional staff" or "administrative personnel," subsection (11) defines "instructional personnel" and subsection (12) defines "administrative personnel." By ordinary usage it is obvious that "instructional personnel" comprise the instructional staff and "administrative personnel" comprise the administrative staff.

Therefore, members of the instructional staff who continue to be entitled to continuing contracts are those persons who are included within the definition contained in §228.041(11), F. S., which include not only teachers, but also supervisors, principals, librarians and others engaged in an instructional capacity in the school.

Members of the administrative staff who were removed from the continuing contract provisions of §231.36, F. S., by the 1967 amendment to that section are those persons included in the definition contained in §228.041(12), F. S., which are those persons who are employed as professional administrative assistants to the county superintendent.

It will be noted that although Ch. 67-387, Laws of Florida, by section 23 thereof, provided that the legislative act should take effect on July 1, 1967, said act was not filed in the office of the secretary of state until July 14, 1967. This office has held that when an act is not filed in the office of the secretary of state until after the effective date named in the act, then the effective date is of no meaning and the act takes effect 60 days following the final adjournment of the legislature. Chapter 67-387, therefore, became effective on Sept. 12, 1967.

Prior to Sept. 12, 1967, continuing contracts were authorized and required for each member of the instructional staff and each member of the administrative staff (as defined above) who met the statutory requirements. Although continuing contracts were not authorized for members of the administrative staff (professional administrative assistants to the county superintendent), after Sept. 12, 1967, continuing contracts entered into with members of the administrative staff prior to Sept. 12, 1967, would be binding on the school board. The answer to question 1 above is, therefore, affirmative as to those members of the administrative staff who held continuing contracts prior to Sept. 12, 1967.

Continuing contracts in essence give the holders thereof the right to continue as employees of the county school system so long as there are positions for such persons and so long as there is not statutory cause (misbehavior) for terminating the contracts. An interpretation of the 1967 amendment to §231.36, F. S., to the effect that the amendment terminated existing contracts with administrative personnel would be subject to the constitutional objection that such enactment impaired the obligations of an existing contract. Question 2 is, therefore, answered in the negative.

For the reasons set forth above I am of the opinion that from and after Sept. 12, 1967, continuing contracts were no longer authorized for administrative personnel as defined by §228.041(12), F. S., but continued to be authorized for instructional personnel as defined by §228.041(11), F. S. In answering question 3 I must, therefore, hold that after Sept. 12, 1967, continuing contracts are no longer authorized for persons employed as professional administrative assistants to the county superintendent, but are authorized for teachers, supervisors, principals, librarians and others engaged in an instructional capacity in the schools.

068-10—January 19, 1968

DOCUMENTARY STAMP TAX

MUNICIPALITIES' LIABILITY UNDER §201.02, F. S., AND CLASS C INTANGIBLE TAX UNDER §199.141, F. S.

To: Dwight A. Whigham, City Attorney, Fort Myers

QUESTIONS:

1. Are deeds executed by municipalities required to bear the documentary stamps provided for in F.S.A. §201.02?

2. Are mortgages in favor of a municipality subject to the Class C intangible personal property tax provided for in F.S.A. §199.141?

Questions 1 and 2 are answered in the negative insofar as the liability of the municipality is concerned. However, note the qualifications found in the conclusion of this letter.

82 C.J.S., p. 557 states: "In general, the word 'person' used in a statute will not be construed so as to include the sovereign, whether the United States, or a state, or an agency thereof, or a city or town." (Emphasis supplied.)

At pp. 554-556, it is stated:

The government, whether federal or state, and its agencies are not ordinarily to be considered as within the purview of a statute, *however general and comprehensive the language of act may be, unless intention to include them is clearly manifest*, as where they are expressly named therein, or included by necessary implication.

This general doctrine applies, or applies with special force, to statutes by which prerogatives, rights, titles, or interests of the government would be divested or diminished, or to *statutes under which liabilities* would be imposed on the government. (Emphasis supplied.)

Section 199.141(3)(a), F. S., which pertains to Class C intangible personal property where material provides in part:

Every person who shall take, receive or record any mortgage, deed of trust or other written specific lien in the nature of a mortgage upon real property situated in Florida shall pay the tax prescribed by this subsection in respect to the debt or obligation secured thereby, and in evidence thereof the tax collector, upon receiving payment thereof, shall place on such mortgage, deed of trust or the instrument evidencing such

specific lien a notation showing the amount of tax levied by this subsection and received by him. *Any person* taking such mortgage, deed of trust or other lien who shall fail or refuse to pay such tax shall be guilty of a misdemeanor, and upon conviction shall be fined accordingly. . . . (Emphasis supplied.)

Note that this section specifically uses the word person in two places. Section 201.02, F. S., where material provides in part:

On deeds, instruments, or writings, whereby any lands, tenements, or other realty, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to or vested in the *purchaser*, or any other *person* by his direction, on each one hundred dollars of the consideration therefor the tax shall be thirty cents; . . . (Emphasis supplied.)

Note that this section uses the word person and the word purchaser.

Section 1.01(3), F. S., defines the word person as follows: "The word 'person' includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, *corporations* and all other groups or combinations." (Emphasis supplied.)

Section 1.01(10), F. S., states in part: "The words 'public body,' 'body politic' or 'political sub-division' include *counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts* and all other districts in this state." (Emphasis supplied.)

Counties and cities are treated as public bodies, bodies politic or political subdivisions and not as persons. In AGO 045-341 p. 336, Biennial Report of the Attorney General for 1945-1946, this was stated: "This office has constantly held that there is no intent in this section to cover instruments executed by the State and its political subdivisions, such as a county. . . ."

In the case of *City of St. Petersburg v. Carter*, 39 So.2d 804, it is stated at p. 805:

It is generally held, and not without sound reason, that the word "corporations" does not include municipal corporations unless they are either expressly included by apt words or there is a clear unmistakable intention that they be included.

There is respectable authority to the effect that the word "persons" may mean and include municipal corporations *but such holding should still be subject to the legislative intent as it is expressed or as it may be gathered from the purpose of the act, the administrative construction of it, other legislative acts bearing upon the subject, and all the circumstances surrounding and attendant upon it.* (Emphasis supplied.)

For the aforementioned reasons questions 1 and 2 are answered in the negative insofar as the municipality's liability is concerned.

However, insofar as question 1 is concerned, this does not mean that the grantee under the deed executed by the municipality would not be required to pay the documentary stamp tax provided for in §201.02, F. S. This is due to the language found in §201.01, F. S., which provides in part where material:

There shall be levied, collected and paid the taxes specified in this chapter, for and in respect to the several documents, bonds, debentures or certificates of stock and indebtedness,

and other documents, instruments, matters, writings, and things described in the following sections, or for or in respect of the vellum, parchment, or paper upon which such document, instrument, matter, writing, or thing, or any of them, are written or printed by any person, who makes, signs, executes, issues, sells, removes, consigns, assigns, or ships the same, *or for whose benefit or use the same are made, signed, executed, issued, sold, removed, consigned, assigned, or shipped in the state.* . . . (Emphasis supplied.)

Therefore the grantee of a deed executed by a municipality would be required to pay the documentary stamp tax.

Insofar as question 2 concerning the Class C intangible personal property tax is concerned, we note that this deals with mortgages executed in favor of a municipality. Please note that §201.08(1), F. S., imposes an excise tax on documents. Generally, there is a promissory note executed simultaneously with the execution of the mortgage and delivered by the mortgagor to the mortgagee. Such promissory note would be subject to the excise tax under §201.08(1), F. S. Also note that this section provides: "Mortgages which incorporate the certificate of indebtedness, not otherwise shown in separate instruments, are subject to the same tax at the same rate." Thus the mortgage or the note attached thereto would seem to be subject to the excise tax provided for in §201.08(1), F. S.

068-11—January 23, 1968

PUBLIC OFFICERS—APPOINTMENT

JACKSONVILLE PORT AUTHORITY—AUTHORITY FOR APPOINTMENT OF EX OFFICIO MEMBERS THEREOF FROM MEMBERSHIP OF OTHER PUBLIC BOARDS

To: *F. Bradley Kennelly, Attorney, Jacksonville Port Authority, Jacksonville*

QUESTIONS:

1. May a member of the Jacksonville Consolidated Government be an ex officio member of the Jacksonville Port Authority, in light of the provisions of section 5.04, Ch. 67-1320, Laws of Florida?

2. What is the effect, if any of the provision in section 1, Ch. 67-1533, Laws of Florida, extending the terms of present members of the city council and county commission, serving as ex officio members of the port authority, for 1 year after the effective date of consolidation?

The Jacksonville Port Authority, created by Ch. 63-1447, Laws of Florida, is a "body politic and corporate," established by the legislature, for the purpose of maintaining, supervising, controlling and operating the sea and water ports within the then existing Duval County. Duval County has since been absorbed into the consolidated City of Jacksonville, created and established under, pursuant to and in accordance with §9, Art. VIII, State Const. Under section 1 of Ch. 63-1447, the Jacksonville Port Authority was authorized to "exercise its jurisdiction, powers and duties within the territorial limits of Duval County," now the territorial limits of the consolidated City of Jacksonville. The membership of the Jacksonville Port Authority is limited to 2 public officials of the consolidated county and city government, formerly 1 county official and 1 official of the City of Jacksonville, and 5 citizens and residents of Duval County, now of the consolidated City of Jackson-

ville. Chapter 63-1447, confines the operations of the Jacksonville Port Authority to the territorial limits of Duval County, now the consolidated City of Jacksonville.

It is provided in paragraph (f) of subsection (17) of section 3 of said Ch. 63-1447, Laws of Florida, that bonded indebtedness of the port authority shall not "be construed or considered to be bonds of the county of Duval or of the city of Jacksonville . . . but shall be solely bonds of said Authority."

An ad valorem tax is prohibited for state purposes (except upon intangible property) by §2, Art. IX, State Const. These facts and circumstances mitigate against any construction of Ch. 63-1447, Laws of Florida, as creating and establishing a state public corporation or agency, and indicate that the port authority was intended as a local and not a state agency. This leads to the view that the port authority was an independent agency of Duval County, now an agency of the consolidated City of Jacksonville, with independent county taxing power.

I think that the legislature was within its authority when it designated a member of the county commission and a member of the municipal commission as ex officio members of the port authority, although it delegated to the board of county commissioners the power and duty of selecting which of its members was to serve and to the city commission the member thereof to so serve. Such member of one governing board, serving as an ex officio member of another governing board, serves under his commission issued to him as a member commissioner, and not an actual member of the board on which he serves ex officio, in the performance of additional duties imposed upon him by the legislature. He holds but a single office, although he performs duties ex officio of another board or office. (*Whitaker v. Parsons*, 80 Fla. 352, 86 So. 247, text 251; *Amos v. Mathews*, 99 Fla. 1, 126 So. 308, text 335; *Flood v. State*, 100 Fla. 70, 129 So. 861, text 864; *State v. Reardon*, 114 Fla. 755, 154 So. 868, text 871; *State v. Florida Turnpike Authority*, Fla., 80 So.2d 337, text 344; see also *State v. Brandt*, 225 Minn. 345, 31 N.W. 2d 5, text 9). These authorities and observations answer question 1 in the affirmative.

The legislature, by Ch. 67-1533, Laws of Florida, extended the terms of office of members of the county commission and the city council, until 1 year after Oct. 1, 1968, when the terms of office of such members would expire on or about said Oct. 1, 1968. It seems that the terms of office of all county commissioners and city commissioners will cease and terminate on the consolidation of the governments of Duval County and the City of Jacksonville, on Oct. 1, 1968. The terms of the county commissioner and the city commissioner serving ex officio on the governing board of the port authority, except for Ch. 67-1533, would terminate on Oct. 1, 1968, and their authority as ex officio members of the governing board of the port authority would terminate and cease. The legislature, by Ch. 67-1533, has attempted to name the two persons serving as ex officio members of the governing board of the port authority, to the board of the port authority, for terms of 1 year from and after the termination of their terms of office upon which their ex officio membership is based. If the member so appointed by the legislature be a state or county officer within the purview and intention of §27, Art. III, State Const., which requires that state and county officers be either elected by the people or appointed by the governor, then such appointment by the legislature would be questionable, if not invalid.

In *State v. Ocean Shore Improvement District*, 116 Fla. 784, 156 So. 433, the legislature had set up a taxing district, partly in Volusia

County and partly in another county, concerning which the court remarked that:

A taxing district is not covered by that provision of the constitution requiring that all officers be elected by the people or appointed by the Governor, consequently the legislature is at liberty to require that bond trustees or supervisors of such districts be designated in other ways, and that voting in said districts be limited to property owners.

I reach the conclusion that the members of the governing board of the Jacksonville Port Authority are neither state nor county officers, within the purview and intention of §27, Art. III, State Const., and therefore are not required to be either elected by the people or appointed by the governor. The extension of the terms of 2 members of the governing board of the Jacksonville Port Authority, for a period of time within the span of 4 years from the date of the extension by the legislature, was an authorized legislative appointment and was valid.

Question 2 is answered by holding that the extension of terms therein mentioned were valid.

068-12—January 25, 1968

PUBLIC FUNDS—TAXING DISTRICTS

EXPENDITURE FOR ENTERTAINMENT PURPOSES—NECESSITY FOR LEGISLATIVE OR BUDGETARY AUTHORITY

To: Ernest Ellison, Legislative Auditor, Tallahassee

QUESTION:

Are expenditures of district funds by the Central and Southern Florida Flood Control District and the Southwest Florida Management District for entertainment purposes legal?

Your letter of Oct. 30, 1967, and the several audit workpaper tabulations attached thereto, pose the question of the legality of the items of expenditure marked with a red X on the several workpaper tabulations mentioned above. The items marked with red X's indicate expenditures from the funds of the Central and Southern Florida Flood Control District and of the Southwest Florida Water Management District, each of which operates primarily in accordance with Ch. 378, F. S., in the cooperative state and federal effort for flood and water control for the purposes mentioned in §378.01, F. S.

The items marked with red X's on the said audit workpapers appear to have been for expenditures for the entertainment and benefit of numerous and divers persons, officers, groups, etc., who doubtless are interested in and concerned with the works and operations of the districts mentioned. These items concern the purchase of meats, beverages, soft drinks, and other items doubtless used in connection with the entertainment of state and federal officers and agents and others, evidently for the purpose of acquainting such persons with the operations and purposes of the said districts and probably with the view of enlisting their assistance in obtaining appropriations from the legislature and the federal congress. These purposes do not clearly appear to be authorized by law, based on the information before us. Lack of detailed explanations concerning the validity and true purpose of such expenditures raises questions concerning the districts' authority to use public funds for such purposes.

I gather from the information before me and general information concerning the operation and administration of districts generally, that said districts have been making expenditures from public funds designed to publicize their operations and activities and to obtain the good will of the public. There is also some indication that expenditures have been made from public funds in order to obtain the good will of the legislature and of congress when appropriations are considered. Other expenditures probably take on the color of lobbying to obtain advantages for the said districts.

This office, in connection with the question of what expenditures by public officers will be deemed authorized official expenditures and what expenditures will be deemed unauthorized expenditures by public officers, must proceed on the theory that §4, Art. IX, State Const., prohibits all expenditures except those made pursuant to appropriations made by law. The phrase, "appropriations made by law" means expenditures expressly authorized by law, that is, under the express authority of a legislative enactment or an express constitutional provision, and expenditures implied therefrom as being necessary for the carrying out of the legislative will. Before an expenditure may be made from state funds there must be a specific appropriation authorizing the expenditure in question, either directly or by clear and specific implication necessary for carrying out the express appropriation. It was held in the Justices' Advisory Opinion to the Governor reported in 156 Fla. 48, 22 So.2d 398, text 400, that the phrase, "appropriations made by law," contained in said §4, Art. IX, State Const., means an act of the legislature adopted by both houses and approved by the governor, becoming a law without his approval, or passed over the veto of the governor.

The flood control and similar districts operating under and pursuant to Ch. 378, F. S., are required to operate under and pursuant to an operating budget established and adopted under and pursuant to §378.28, F. S. Budgets made and adopted by the flood and water control districts, operating under or pursuant to Ch. 378, F. S., must conform to the applicable statutes and laws and provide for expenditures which are authorized by applicable statutes and laws. Expenditures from funds of the Central and Southern Florida Flood Control District must be expenditures authorized by applicable statutes and laws, as well as by the annual budget of the said district, or special budget, made and adopted under and pursuant to statutes and laws applicable thereto. These district budgets are comparable to legislative appropriations made under and pursuant to said §4, Art. IX, State Const.

The general powers, duties and obligations of the said flood control district and water management control district, are set out generally in §378.01, F. S. These powers, duties and obligations relate directly to the establishment, construction, operation and maintenance of the works of the said districts for the uses and purposes mentioned in said §378.01, F. S. Some statutes and laws establishing districts, boards, agencies, etc., contain specific provisions authorizing the use and expenditures of portions of their funds for hospitality, entertainment and other specified purposes, which provisions tend to indicate that specific legislative authority is required when expenditures are not normally part and parcel of the general administration and operation of the business of the district, agency or office.

An examination of the following opinions of this office: AGO 045-153, of June 25, 1945, 1945-1946 Biennial Report of the Attorney General p. 242; AGO 049-536, of Nov. 4, 1949, 1949-1950 Biennial Report of the Attorney General p. 180; AGO 054-93 of Apr. 19, 1954, 1953-1954 Biennial Report of the Attorney General p. 143; AGO 056-155, of May 21,

1956, 1955-1956 Biennial Report of the Attorney General p. 664; AGO 058-305, of Nov. 10, 1958, 1957-1958 Biennial Report of the Attorney General p. 867, together with letters to Harry R. Chadwick, Jr., on May 6, 1958; James Jackson, on Nov. 3, 1965; C. E. Duncan, on Jan. 12, 1966; Jack P. Fitzgerald, on Feb. 2, 1966; John L. Burns on Feb. 17, 1967, and others, reveals that usually in the absence of specific legal authority, expenditure of public funds for hospitality and entertainment are not proper expenditures from public funds. See also opinions of the Sup. Ct. of Fla., in *Jacksonville v. Oldham*, 112 Fla. 502, 150 So. 619; *Loeb v. City of Jacksonville*, 101 Fla. 420, 134 So. 205 and others. In many of the recent statutes or local laws, as well as in amendments of existing statutes or local laws, specific and express provision has been made by the legislature for the expenditure of public funds for purposes of hospitality and entertainment by the district, authority, commission, agency, etc., which leads to the suggestion, if not the conclusion, that the legislature, in such instances, must have deemed legislation necessary before public funds may be used for purposes of hospitality and entertainment. Normally, the creation and establishment of a flood control district, a water management district, a drainage district and districts generally, would not of itself indicate the need of carrying on extensive programs of hospitality and entertainment and similar programs, unless there be inserted in the charter, or other applicable statute, a specific provision therefor. Normally, the creation or establishment of a flood control district, or water management district, would not of itself put the public on notice that an extensive advertising campaign or hospitality and entertainment programs were intended.

Vouchers for payment of public funds, whether state, district or county, submitted or to be submitted to the paying agency should contain sufficient information for the paying agency, or its preauditors or officials and the postauditor to determine whether the requested payment is authorized by law. Doubtless, in many instances the purposes for which payment is requested will appear, without explanation, from the face of the voucher; however, in many other instances the legality of the payment requested will not appear from the face of the voucher. In those instances where the legality of the requested payment is not readily apparent to the paying agency the paying agency is justified in turning down the request for payment or requesting clarification. The person issuing the voucher for payment is obligated to cast such vouchers in such language as will indicate to the postauditor or the public the legality of such payments.

Whether the particular items of expenditure marked on the accompanying audit work papers are warranted under the heading of "promotion" (§378.451, F. S.) is a judgment which further information should support.

068-13—January 25, 1968

COURTS

ASSIGNMENT OF JUDGES BY JUSTICE OF SUPREME COURT— JURISDICTIONAL REQUIREMENTS—§2, ART. V, STATE CONST., AND FLORIDA APPELLATE RULES

To: *D. E. Whitney, County Judge, Sarasota*

QUESTION:

May a Judge of the County Court of Sarasota County, conduct trials in the Court of Record of Manatee County at the request of the judge of said court when the jurisdiction of the Court of Record of Manatee County is greater than that of the County Court of Sarasota County?

Chapter 67-1062, Laws of Florida, created a Court of Record in and for Manatee County, with jurisdiction of all criminal cases not capital which shall arise in Manatee County. Section 18 of said law specifically provides that when the judge of said court is for any reason unable to act as such judge, then another judge shall be assigned and transferred to said court as now or hereafter provided by the State Const.

The controlling provisions of the State Const. are found in §2, Art. V, State Const., wherein it is specifically provided that judges of courts other than the supreme court, district courts of appeal, and circuit courts (which other courts would include the County Court of Sarasota County) may be temporarily assigned to judicial service in any court of the same or lesser jurisdiction, in accordance with the rules of the Supreme Court of Florida.

Florida Appellate Rule 2.1a(3) vests the Chief Justice of the Supreme Court of Florida with the power to temporarily assign judges of courts other than the Supreme Court of Florida and district courts of appeal and circuit courts to judicial service in any court of the same or lesser jurisdiction. Subsection (4) relates to how assignments of judges are made with paragraph (g) providing that when the judge of any criminal court of record or civil court of record or civil and criminal court of record is unable to perform the duties of his office for cause, the chief justice may assign any judge of any other criminal or civil court of record having the same or greater jurisdiction to perform the duties of said judge for such time as the chief justice may direct. The Court of Record of Manatee County is a civil and criminal court of record by its jurisdictional powers.

It should be noted that §34.01, F. S., specifically provides that the jurisdiction of county courts such as that presently existing in Sarasota County is limited to misdemeanors in criminal cases. It thus becomes apparent that the County Court of Sarasota County is a court of lesser jurisdiction than the Court of Record in and for Manatee County which under section 20 of Ch. 67-1062, Laws of Florida, has exclusive jurisdiction of all criminal offenses, save capital offenses. It therefore must follow that you, as Judge of the County Court of Sarasota County, would not have the qualifications in view of the limited jurisdiction of your court to be assigned to the Court of Record of Manatee County under the organic limitations of the State Const., the latter court having both greater civil and criminal jurisdiction.

Under somewhat analogous circumstances, the Supreme Court of Florida *In re Advisory Opinion To The Governor*, 58 So.2d 319 (1952) ruled that under the then existing constitutional provision a judge could not be assigned to a court having a higher jurisdiction than that prescribed for the court over which he presides.

In view of the above, your question is answered in the negative, and it would be necessary for the Chief Justice of the Supreme Court of Florida to assign a judge of a court of equal jurisdiction or superior jurisdiction to the Court of Record of Manatee County to conduct the trial of the cases of which you write.

068-14—January 30, 1968

COURTS

ASSISTANT STATE ATTORNEYS—COMPENSATION PURSUANT
TO CH. 67-188, LAWS OF FLORIDA (§27.181, F. S.)

To: J. H. Guerry, Executive Director, Judicial Administrative Commission, Tallahassee

QUESTIONS:

1. Are the salaries of assistant state attorneys, appointed pursuant to Ch. 67-188, Laws of Florida (§27.181, F. S.), fixed at \$10,000 per annum?
2. If the answer to the first question is in the negative, what officer or agency of the state government shall determine the compensation of said assistant state attorneys?

Question one is answered as follows: Chapter 67-300, Laws of Florida, general appropriations, in section 8, paragraph (b) (§282.01-8)(b), F. S.) provides:

... The salaries of the assistant state attorneys to be paid by the state shall be \$10,000 each per annum; provided nothing herein shall be construed to reduce the salary of any assistant state attorney; provided, further, any supplement now provided by local or special act shall not be affected or repealed by this provision.

This legislation was filed and effective on July 1, 1967.

Chapter 67-188, Laws of Florida, "AN ACT relating to assistant state attorneys," which allows for the appointment by the state attorney of assistant state attorneys upon expiration of the terms of incumbents, provides in section 4:

Until otherwise provided by law, each assistant state attorney appointed by a state attorney under the authorization of this act shall receive the compensation and allowances for expenses provided by law at the time of his appointment, to be paid in accordance with such law.

This legislation was filed on June 13, 1967, to take effect September 1, 1967.

Reading the two statutes in pari materia, and assuming without deciding that Ch. 67-188, Laws of Florida, does not violate §27, Art. III, State Const., which requires election or gubernatorial appointment of "officers," assistant state attorneys appointed pursuant to Ch. 67-188, Laws of Florida, are, by the referential terms of that very enactment, to be paid as per the prescription of Ch. 67-300, section 8, paragraph (b) (§282.01(8)(b), F. S.). That is, a state salary of \$10,000 or said sum plus such supplement as might be obtained by virtue of local or special acts is contemplated by Ch. 67-188, Laws of Florida. Question 2 is thereby mooted.

068-15—January 31, 1968

STATE AND COUNTY OFFICERS AND EMPLOYEES RETIREMENT
SYSTEM

HIGH HAZARD BENEFITS—STATE ATTORNEYS NOT ELIGIBLE

To: *Richard E. Gerstein, State Attorney, Eleventh Judicial Circuit, Miami*

QUESTION:

Is a state attorney, as an elected official, eligible for "high hazard" retirement benefits provided by Ch. 67-193, Laws of Florida (§122.34, F. S.)?

It appears that state attorneys, although elected officials, are not contemplated by §122.34(1)(b), F. S., which provides as follows:

Only those members who are *full-time criminal law enforcement officers or agents*, as certified by the employing authority, who perform duties according to rule, order, or established custom as a *full-time criminal law enforcement officers or agents* shall be certified to the comptroller as "high hazard" members and only such members will be approved by the comptroller. (Emphasis supplied.)

Prior to focusing this discussion upon your particular question, it might prove beneficial to quickly survey the history and probable legislative intent of §122.34(1)(b), F. S.

Chapters 63-448, 63-555 and 65-484 Laws of Florida, have all concerned themselves with "high hazard" retirement benefits in re sheriffs and full-time deputy sheriffs. Chapter 67-193, although still relating to "high hazard" benefits, has expanded that class of officers which qualifies as "high hazard" members. However, a careful reading of Ch. 67-193, with the prior relative chapters in mind, leads one to conclude that the legislature intended to include as "high hazard" members only those full-time criminal law enforcement officers whose duties closely resemble those of sheriffs and full-time deputy sheriffs.

Your question specifically relates to Ch. 67-193, Laws of Florida, and its applicability to state attorneys. Section 27.02, F. S. (1965), enumerates the primary duties of a state attorney, which include the prosecution and defense on behalf of the state of all suits, applications or motions, civil or criminal, in which the state is a party.

Since §122.34(1)(b), F. S., is applicable only to full-time criminal law enforcement officers, a state attorney's duties, which entail civil matters, would preclude his inclusion within this section.

For the foregoing reasons your inquiry concerning the applicability of Ch. 67-193, Laws of Florida, to state attorneys must be answered in the negative.

068-16—February 1, 1968

EXECUTIVE VETO OF APPROPRIATION

CONSTRUCTION OF §18, ART. IV, STATE CONST.—APPLICATION TO §4, CH. 67-605, LAWS OF FLORIDA, CREATING THE CAPITOL SAFETY COMMITTEE

To: *Tom Adams, Secretary of State, Tallahassee*

QUESTION:

Is there authority for the proposition that the governor's putative veto of section 4 of Ch. 67-605, Laws of Florida, was valid and effective?

Chapter 67-605, Laws of Florida, (§255.24, F. S.) is creative of

the Capitol Safety Committee, definitive of its composition and declarative of its powers and duties. Section 4 of Ch. 67-605, Laws of Florida, which section the governor purported to veto, provides:

... [There is hereby appropriated from the general revenue fund the sum of one hundred thousand dollars (\$100,000.00) for the biennium beginning July 1, 1967, for the purpose of carrying out the powers, duties and functions of the committee in providing for the health, safety and welfare of the occupants of the capitol building.]

Virtually the same problem evocative of the same question was treated by this office in AGO 067-70, Oct. 25, 1967. In that situation the governor purported to veto Section 12 of Ch. 67-604, Laws of Florida, and thereby to veto the sole appropriation for the Industry Services Advisory Board created by Ch. 67-604 (\$230.66, F. S.). It was my opinion in that instance that the governor's authority to exercise an item veto of appropriations (§18, Art. IV, State Const.) contemplated and extended to the veto of discrete items in a general appropriations bill. But "a bill making provision for the payment of expenses necessary and incidental to the law itself is a bill containing but a single item of appropriation," and the functional nexus of the act's sections indicates that "the Governor would not be authorized to veto the item of appropriation without vetoing the entire act." Since the governor did not manifest any intention to veto the entire act, I held that "the Governor's attempted veto of section 12 of Ch. 67-604, Laws of Florida, was of no force or effect." See AGO 067-70, Oct. 25, 1967, and citations therein.

With respect, then, to the governor's attempted veto of section 4, Ch. 67-605, Laws of Florida, it must be asserted that said attempt was without effect and said "veto" was invalid.

068-17—February 5, 1968

INDUSTRIAL COMMISSION

FUNDING OF "PREVAILING WAGE RATES"—ENFORCEMENT

To: *Wallace W. Henderson, Director, State Planning and Budget Commission, Tallahassee*

QUESTIONS:

1. May the workmen's compensation administration trust fund be used to fund the Florida Industrial Commission's "prevailing wage rates" program under §215.19(2)(a), F. S.?
2. May the planning and budget commission make an allotment from the deficiency appropriation under section 2 of Ch. 67-300, Laws of Florida (§282.01, F. S.), to fund said program?

AS TO QUESTION 1:

Unarguably, the legislative intent as verbally manifested has first claim to influence upon any interpretation of the legislation. In this instance it is an eminently reasonable claim.

The workmen's compensation administration trust fund is established by §440.50(1)(a), F. S., for the express purpose of "... providing for the payment of all expenses in respect to the administration of this chapter, ..." By operation of the rule *expressio unius, exclusio alterius*, this purpose and one other "... vocational rehabilitation of

injured employees as provided in §440.49." . . . should be deemed to be exclusive.

Hence, this trust fund is, by manifest legislative intent, not geared to nor financially foundational to an extraneous responsibility of the industrial commission, to wit: (a) An operation alien to the workmen's compensation program, (b) Mandated not in Ch. 440, F. S., but rather in Ch. 215, F. S.

Question 1 is, therefore, answered in the negative.

AS TO QUESTION 2:

The "prevailing wage rates" program, which §215.19(2)(a), F. S., makes the responsibility of the industrial commission, is to be funded by legislative appropriations according to §215.19(7), F. S.

As your letter observed these very appropriations items (Items 680-684, Ch. 67-300, section 1, Laws of Florida) were vetoed by the governor.

Section 2 of Ch. 67-300, Laws of Florida, (§282.01(2), F. S.) authorizes the planning and budget commission ". . . to supplement the appropriations made from the General Revenue Fund to the named agencies in Section 1 . . ." such supplement to be used in the face of "an emergency, or deficiency, as the case may be." . . .

Even as the governor's veto of the aforementioned Items 680-684 did perhaps precipitate "an emergency" to the alleviation of which section 2 moneys might be put, so too did the veto effectively erase said appropriations (*In re Advisory Opinion*, 45 Fla. 305, 31 So. 348, 349; 25 Fla. Jur., §17, pp. 539, 540)—thereby making it impossible for the planning and budget commission "to supplement the appropriations" and foreclosing this use of section 2 moneys.

Question 2 is answered in the negative.

I would refer you, however, to AGO 067-64, Sept. 11, 1967, which advises that in the absence of appropriations for agencies with legislatively mandated responsibilities, those responsibilities might be discharged by the personnel of sister agencies in the name of the unfunded agency. Such an arrangement, of course, would be a matter of negotiation entered into by the affected agencies.

068-18—February 6, 1968

COURTS

MAGISTRATE'S COURT, BREVARD COUNTY—JUDGE AS COMMITTING MAGISTRATE—PRELIMINARY HEARINGS

To: Robert B. McGregor, Judge, Magistrate's Court, Titusville

QUESTIONS:

1. Is a defendant entitled to a preliminary hearing in a felony case where the county solicitor has filed an information charging him with such a felony?

2. If the answer to question 1 is in the affirmative, what disposition of the matter should be made by the committing magistrate if he finds no probable cause to bind the defendant over for trial in the court of record of Brevard County?

3. When a defendant is arrested on a felony charge and brought before the judge of the magistrate's court, and such judge sets a subsequent date for the holding of a preliminary hearing, and thereafter, but before the time set for such hearing, the solicitor files an information charging the defendant

with such felony, should such judge proceed to hold the scheduled preliminary hearing?

4. Is the defendant entitled to a preliminary hearing after he has been charged with a misdemeanor by information filed by the county solicitor?

5. Before which judicial officer in Brevard County should a defendant be granted a preliminary hearing upon his request after he has been charged with a misdemeanor by complaint, rather than information, filed in the magistrate's court of said county?

I note that Ch. 67-1018, Laws of Florida, created the Magistrate's Court of Brevard County, gave it jurisdiction of all misdemeanors, and made each judge of said court a committing magistrate. Said chapter provided that prosecutions in said court shall be upon indictment, information, affidavit or complaint under oath, and made the solicitor of Brevard County the prosecuting attorney of said court.

AS TO QUESTION 1:

In *Baugus v. State*, 141 So.2d 264, 267, the Sup. Ct. of Fla. said, with respect to a preliminary hearing:

To begin, the procedure of hearing a case preliminarily is not a step in due process of law, is not a prerequisite to a criminal prosecution or the filing of an indictment. It serves only to determine whether or not probable cause exists to hold a person for trial, *Rouse v. State*, 44 Fla. 148, 32 So. 784; *Di Bona v. State*, Fla. App., 121 So.2d 192, and a prosecution may be instituted and maintained regardless of such an investigation.

In *Di Bona v. State*, 121 So.2d 192, 194, the 2nd Dist. Ct. of App., said: "... The fact that a committing magistrate discharges a defendant does not prevent a grand jury or a solicitor from finding that the evidence is sufficient to warrant the filing of an indictment or information. . . ."

In *Prevatt v. State*, 184 So. 860, 864, the Sup. Ct. of Fla. said:

... [T]he sufficiency of the evidence so presented to the County Solicitor is a matter of which the County Solicitor must be the sole and final judge and as to which neither the court nor the defendant may inquire. This must be true, else in all cases the State would first be put to the trial of a plea in abatement and then to a trial on the merits.

The rule is laid down in 21 Am.Jur.2d 445, Criminal Law, §442, that: "If the grand jury finds an indictment, there is no need to conduct a preliminary examination. . . ." [This rule would also apply to the filing of an information where the law permits the filing thereof.]

The purpose of a preliminary hearing is to determine whether there is probable cause to hold the accused for trial. When an information is filed, a defendant cannot challenge the sufficiency of the evidence to justify the filing thereof. Consequently, it would be but a futile gesture to give him a preliminary hearing as to an alleged offense after an information charging the same offense has already been filed against him. A preliminary hearing would accomplish nothing; even if the magistrate should find that no probable cause existed, that would not relieve the defendant of the necessity of answering to the information. Question 1 is answered in the negative.

AS TO QUESTION 2:

Your statement of question 2 requests an answer only in the event that question 1 is answered in the affirmative and I have answered question 1 in the negative. However, I observe that in the light of my answer to question 1, question 2 should not arise because no preliminary hearing should be held by a magistrate on a felony charge after the county solicitor has filed an information charging the defendant with such felony.

AS TO QUESTION 3:

In the light of the comments made and authorities cited in my answer to question 1, it is my opinion that under the circumstances mentioned in question 3 the accused is not entitled to a preliminary hearing and that none should be held.

AS TO QUESTION 4:

As pointed out in my discussion of question 1, the purpose of a preliminary hearing is to determine whether there is probable cause to hold the defendant for trial and he is not entitled to challenge the sufficiency of the evidence to justify the filing of the information, it is my opinion that a defendant who is charged by information with a misdemeanor is not entitled to a preliminary hearing.

AS TO QUESTION 5:

Section 902.01, F. S., provides in pertinent part that:

... When the defendant is brought before the magistrate upon an arrest, either with or without a warrant, on a charge of having committed an offense which the magistrate is not empowered to try and determine, the magistrate shall immediately inform him: ... (Emphasis supplied.)

and §902.04, F. S., provides that unless the defendant requests the aid of counsel the magistrate shall proceed to examine the case except when the defendant waives such examination.

Florida Rules of Criminal Procedure Rule 1.122 is substantially the same except that it omits the italicized words in the above-quoted portion of §902.01, F. S.

Neither the statute nor the rule authorizes the conducting of a preliminary hearing by any judicial officer except the magistrate before whom is brought an arrested person charged with an offense. But is there any requirement that that magistrate hold a preliminary hearing when he is empowered to try the defendant for the offense charged against him? I think not.

Despite the fact that the rule does not contain the said italicized statutory words, I consider that it does not contemplate that a preliminary hearing be given a defendant by a magistrate who has power to try him for the offense with which he is charged. In 22 C.J.S. 847, Criminal Law, §332a, the law on this point is stated as follows:

... No preliminary examination is required where the examining magistrate has jurisdiction to try accused for the offense charged, for if the justice himself has jurisdiction to try the offense, he must proceed to try and determine, and he cannot shift the responsibility by taking a preliminary examination and holding accused to answer in a higher court. ... (Emphasis supplied.)

Therefore, it is my opinion that no preliminary hearing should be given by any judicial officer to a defendant who is brought before a judge of the Magistrate's Court of Brevard County on a charge which

such judge is empowered to try. [The opinions expressed above have reference to the usual kind of preliminary hearings. Of course, a trial court may give a defendant a "preliminary hearing" after the filing of an information against him, under the special circumstances mentioned in §909.04, F. S.]

068-19—February 7, 1968

LEGISLATURE

LEGISLATION—EFFICACY CONDITIONED UPON RATIFICATION AT STATEWIDE REFERENDUM

To: Verle A. Pope, President, Florida Senate; Ralph D. Turlington, Speaker, House of Representatives; John E. Mathews, Jr., President-Elect, Senate; Fred Schultz, Speaker-Designate, House of Representatives, Tallahassee

QUESTIONS:

1. May the legislature condition the efficacy, i.e., the effective date, of taxation or appropriations legislation necessary for the maintenance of the state educational system upon the contingency of an affirmative vote of a majority of those electors choosing to participate in a statewide referendum upon the subject?

2. May the legislature condition the effective date or the repeal date of appropriations or taxation legislation, otherwise constitutionally valid, upon the adoption or rejection of proposed constitutional amendments?

The State Const. places upon the legislature 2 duties to the people of this state, which duties are important in considering the foregoing questions. First, §1, Art. XII, State Const., requires the legislature to provide for a uniform system of public free schools and for the liberal maintenance thereof.

Sections 1, 2 and 3, Art. IX, State Const., require the legislature to provide for a uniform and equal rate of taxation, to provide for raising revenue sufficient to defray state expenses and to levy taxes only in pursuance of law.

The Supreme Court of Florida has acted to insure the legislature's discharge of its constitutional responsibilities by invalidating proposed alienation or unlawful delegation of its legislative duties. In *Whitney v. Hillsborough County*, 127 So. 486, 493, for example, the court held that the legislature may not abdicate its "legislative function of taxation."

This rule would seem to be required by the very nature of our representative government, which is government by those representatives upon whom the people have placed political duties and responsibilities. (See *The Federalist Papers No. 10*, James Madison; *Initiative, Referendum and Recall*, Charles Beard and Birl Shultz, p. 26.)

All "political power is inherent in the people" according to §2, Declaration of Rights, State Const.; and by Art. II of the State Const. the people have made a tripartite distribution of that power among the legislative, judicial and executive branches of government and have made a tripartite allotment of the responsibility for the exercise of that power. Responsibility for the liberal maintenance of our

public educational system and for the provision of tax revenues to defray state expenses has been vested in the legislature.

The notion that the duty to maintain our government by the raising of revenues may be alienated by the legislature is not indicated by our constitution and is alien to the greatest number of American state governments. (See 28 Am. Jur., *Initiative, Referendum and Recall*, §9, p. 156; *The Initiative, Referendum and Recall*, Munro, pp. 8 and 10.)

The Supreme Court of Alabama has had a similar question presented to it under the Constitution of Alabama, which provides "The legislative power of this state shall be vested in a legislature which shall consist of a senate and a house of representatives," which provision is almost identical to §1, Art. III, of our State Constitution. That court, in *In Re Opinions of the Justices*, No. 36, 166 So. 706, held:

Here is the express constitutional provision for representative government, as distinguished from one of direct legislation by the people. It is based on the concept that democratic government functions best through a written Constitution vesting the full legislative power in representatives chosen by the people from all sections of the state, sitting together in two distinct deliberative bodies, with full power to give hearings, make inquiries as to all matters shedding light on the wisdom and fairness of the proposed legislation. Numerous safeguards in the passage of laws are provided, not the least of which is a veto power in the Governor.

The general proposition is everywhere recognized that the Legislature cannot delegate its legislative powers, save as authorized by the Constitution itself.

* * * * *

By the great weight of authority in America it is firmly held that an enactment to become the law of the state or not, as the result of a state-wide election, called in the act, is a delegation of legislative power or an abrogation of the power conferred on the Legislature, a departure from the fundamental principles of representative government.

The leading case of *Barto v. Himrod*, 8 N.Y. (4 Selden) 483, 59 Am. Dec. 506, 512-514, dealing with a Constitution like ours, declared the law in these words:

* * * * *

"In short, the law was a mere proposition submitted to the people to be adopted or rejected as they pleased. If this mode of legislation is permitted and becomes general, it will soon bring to a close the whole system of representative government which has been so justly our pride. The legislature will become an irresponsible cabal, too timid to assume the responsibility of law-givers, and with just wisdom enough to devise subtle schemes of imposture, to mislead the people. All the checks against improvident legislation will be swept away; and the character of the constitution will be radically changed."

A review of the authorities generally will be found in *People of State of Illinois ex rel. Charles M. Thomson v. Barnett et al.*, etc., 344 Ill. 62, 176 N.E. 108, 76 A.L.R. 1044, and note, page 1053 et seq. See, also, 12 C.J. p. 841; *Cooley's Con. Lim.* p. 239.

To hazard the discharge of this high constitutional duty upon a contingency such as this question contemplates would be to make the

continuing function of state government so uncertain as to invite a condition of chaos and confusion, the existence of which our Supreme Court has consistently condemned. Question 1 is answered in the negative.

I turn now to a consideration of question 2. Article XVII of the State Constitution requires that amendment of the constitution be effected by a vote of the electorate at large. But, the legislature's power to submit proposed constitutional amendments to referendum is a power organically related to and unseverable from the legislature's aforementioned duties under Articles IX and XII of the State Constitution.

So integral to the very existence of the state is the legislature's duty to fund the operations of the state that §30, Art. III, State Const., admonishes: "Laws making appropriations for the salaries of public officers and other current expenses of the State shall contain provisions on no other subject."

The compelling rationale of this constitutional provision, as stated by our Supreme Court in the case of *Amos v. Mosely*, 74 Fla. 555, 77 So. 619, is the prevention of the inclusion of foreign measures in appropriations bills—or appropriations bills inextricably tied to foreign matters—which would take advantage of the necessities of the state. This principle protects from political contingencies the legislative performance of vital constitutional duties.

It is doubtful that the constitutional duties to maintain a state school system and raise public revenues are less constitutionally secure from the political hazards specified by your question than is the appropriation of said public revenues which §30, Art. III, State Const., seeks so to secure.

Certainly, implementing legislation germane to the purpose of a constitutional amendment and coextensive with its subject matter may be made contingent upon the adoption of such amendment. However, legislation which is not logically necessary to effectuate the operation of the proposed constitutional amendment should not be made contingent upon the adoption of the amendment. The rationale of the foregoing rule against the practice which the courts have termed "logrolling" is obvious.

The legislature may not make legislation which is necessary for the continued functioning of state government hostage to an affirmative vote upon given constitutional amendments not logically or necessarily related to said legislation. To hold otherwise would permit the subjection of the voter to the grossest duress when he should be permitted to exercise a free and unencumbered choice.

068-20—February 7, 1968

TAXATION

ASSESSMENT OF REAL PROPERTY BY MUNICIPALITY— EVALUATION BASIS SIMILAR TO THAT USED BY DESIGNATED COUNTY ASSESSOR

To: *Robert L. McBrien, Mayor, Palm Beach Shores*

QUESTION:

Is it legal for the Town of Palm Beach Shores to assess real property of the municipality in accordance with and on the same evaluation basis as that used by Palm Beach county tax assessor?

In the case of *Thompson v. City of Key West, Fla.*, 82 So.2d 749, it is stated at pp. 751 and 752:

Appellants further contend that the assessments on their lands for the years 1946 through 1949 are invalid because based on the county assessments and being so are *not bona fide assessments of the city assessor. The record discloses cooperation between the county and city assessors in making up the tax rolls but we will not presume that such cooperation amounted to an unlawful delegation of power or to an unlawful assessment.* (Emphasis supplied.)

Note that the court in this case sanctioned cooperation between the city and county assessors so long as such cooperation does not amount to an unlawful delegation of power or to an unlawful assessment.

This question is discussed at length in the case of *City of Tampa v. Kaunitz*, 39 Fla. 683, 23 So. 416 p. 420:

We think it is *absolutely essential* to the validity of a tax levy that the assessment be made by the officer authorized by law to make it. The person making the assessment must be that officer, either *de jure* or *de facto*. *We do not mean to intimate that the officer must personally perform every act connected with the assessment and the making of the tax roll. Many of these acts are of a clerical nature, involving no exercise of discretion, and having no relation to any right of the taxpayer.* A very large portion of these duties consists in transcribing upon the rolls the various assessments, and in calculating the amounts of taxes levied thereon. *The assessor may call to his assistance the services of other persons, whether officers or not, in the performance of all clerical or ministerial duties, and the assessment will not be invalid for that reason if the work of others is done under his supervision, or is ratified or adopted by him.* But if the assessor, either from neglect, or because of other pressing duties devolving upon him, permits his assistants to perform *all the duties* relating to the assessment for a whole tax year, while he abstains from any duty connected therewith, an assessment so made will be utterly void, and it is the duty of the courts to so declare it. The reasons are succinctly stated by Mr. Blackwell (*Tax Titles*, vol. 1, §168) as follows: "The statute being the authority, and the officer the agent to execute it, and no one being empowered to do the act except the person specially designated in the law for that purpose, it follows that a stranger to the power cannot execute it. *The power is conferred upon the officer, not the man. It is an official, not a personal, trust. It does not rest upon confidence, but upon official responsibility . . .*" (Emphasis supplied.)

Note particularly the italicized parts of said quotation. Note that the courts specifically pointed out that the assessor could call to his assistance the services of other persons, officers or not, in the performance of all clerical or ministerial duties and that the assessment would not be invalid if the work of the others was done under his supervision, or was ratified or adopted by him.

The case of *Peters v. Hansen, Fla.*, 157 So.2d 103, involved a situation where the county tax assessor had contracted with a private appraisal firm. At p. 104 of said case it is stated:

The contract in question is the familiar one, in which a tax

assessor employs an appraisal firm to make a reappraisal and revaluation of the taxable property in his county, for the purpose of equalizing assessed valuations, and thereby effecting a more equitable distribution of the tax burden. *This is well within the scope of the tax assessor's duties.* (Emphasis supplied.)

At p. 105 it is stated:

It is the well settled rule in this state that if a statute imposes a duty upon a public officer to accomplish a stated governmental purpose, it also confers by implication every particular power necessary or proper for the complete exercise or performance of the duty, that is not in violation of law or public policy. *In re Advisory Opinion to the Governor, Fla., 60 So.2d 285, and cases therein cited.* The assessing of all property in his county at its full cash value imposes a heavy duty upon the tax assessor, which he cannot perform without assistance, especially in the more highly developed counties. *He has the implied power to employ persons to do work of a clerical or ministerial nature, requiring no exercise of official discretion, and involving no substantial rights of the persons against whom assessments are made, where such work is done under his supervision, or he ratified or adopted it.* *City of Tampa v. Kaunitz, 39 Fla. 683, 23 So. 416; City of Tampa v. Mugge, 40 Fla. 326, 24 So. 489; Clements v. Starbird, 152 Fla. 555, 12 So.2d 578.* Although these cases relate to the powers of municipal tax assessors, *their ratio decidendi applies equally well to county assessors of taxes.* (Emphasis supplied.)

In the case of *Town of Kissimmee City v. Cannon, 26 Fla. 3, 7 So. 524*, the court sanctioned the situation where the assessor made evaluation in a memorandum book and afterwards consulted with members of the equalizing board in regard thereto. In some instances the assessor adopted the suggestions by such members, but in other instances the assessor did not. This was not found to be improper.

In the case of *Freeze v. County of Pinellas, Fla., 146 So.2d 97*, the court stated at p. 99: "In the exercise of all governmental power it is obviously the ultimate judgment or decision which an officer is required to make personally." (Emphasis supplied.) (Note that this requires that the ultimate judgment or decisions of the officer be made personally by him.) In footnote six on p. 99 it is stated:

Testimony of the appellee Assessor is clear and unequivocal to the effect that the contract was executed with his knowledge and consent, but that he accepted the corporate appraisals only to "use those values to help me decide what is the proper assessed value to establish for this year's tax roll."

Note in this case the county tax assessor had employed Hunnicutt Corporation to assist in the appraisal of property. This had been attacked as being in violation of §20, Art. VIII, State Const. The court found that such exemption did not contravene directly or indirectly the constitutional mandate. The court also found that §193.111, F. S., was sound.

In the case of *State v. McNayr, Fla., 113 So.2d 312*, the court dealt with a situation involving a reappraisal board. Therein at p. 317 the court stated: "In either event, the report of the reappraisal board was not binding on the tax assessor although it could properly be used by him as a guide." (Emphasis supplied.)

Thus by these authorities we see that the courts have clearly pointed out that it is the ultimate decision which must be made by the assessing officer. The courts have further pointed out that such officer has the implied power to employ others in ministerial or clerical functions to assist him and to provide data and information which will aid him in arriving at his ultimate decision, so long as the assessing officer supervises such activities, or adopts or ratifies such activities.

Section 22, Art. VIII, State Const., provides generally that the legislature may, by general, special or local act, provide for the assessment of taxes of any municipality by the county tax assessor of the county wherein such municipality is located. This constitutional provision sets forth the manner in which this may be done.

Other counties and cities in the state have seen fit to deal with this problem by constitutional amendment. In this respect see §§12-21, Art. VIII, State Const. I believe that these observations and authorities cited herein will provide you with the necessary guidelines to achieve the purpose you desire.

068-21—February 8, 1968

CRIMINAL PROCEDURE

CRIMINAL COURTS OF RECORD—PROCEDURE AUTHORIZED IN CONNECTION WITH MENTALLY DISORDERED SEX OFFENDERS—CONSTRUCTION OF §917.12, F. S., AS AMENDED BY CH. 67-451, LAWS OF FLORIDA

To: *Robert S. Appleton, Judge, Criminal Court of Record, Key West*
QUESTION:

Under §917.12, F. S., as amended by Ch. 67-451, Laws of Florida, may the judge of a criminal court of record conduct the hearing therein provided for, make a determination that the person involved is a mentally disordered sex offender where the facts justify such a determination, and commit him for care, treatment and rehabilitation, without certifying him for hearing and determination by the circuit court?

Section 917.12(2)(a), F. S., as amended by Ch. 67-451, Laws of Florida, provides that under prescribed circumstances, the trial judge may certify the person involved for hearing and determination by the circuit court to determine whether he is a mentally disordered sex offender. Then it goes on to provide that:

... If such judge is the judge of a court having jurisdiction to try noncapital felonies, he may proceed in such court in all respects as a circuit judge is authorized to proceed in the circuit court under subsection (2)(b) and (c), and subsections (3) and (4) of this section and exercise the powers, authority and jurisdiction, and shall perform the duties which a circuit judge is authorized to exercise and required to perform in the circuit court. (Emphasis supplied.)

According to its literal wording, said quoted language authorizes the judge of a court having jurisdiction to try noncapital felonies to proceed in such court in all respects as a circuit judge is authorized to proceed in the circuit court under §917.12(2)(b), F. S. Subsection (2)(b) has nothing to do with how a circuit judge shall proceed in such matters;

it merely deals with the right of the defendant to a speedy trial and with the effect of a subsequent acquittal of the criminal charges against him. Therefore, it is obvious that the legislature did not intend to refer to subsection (2)(b) in the above-quoted excerpt from subsection (2)(a).

Said quoted excerpt also refers to procedures to be followed by a circuit judge under subsections (2)(c), (3) and (4). These references are apt and in accord with the clear legislative intent.

Section 917.12(2)(c), F. S., deals with the procedure to be followed by a circuit judge with respect to the appointment of psychiatrists to make examinations and to report to the court. Subsection (3) deals with procedure to be followed by a circuit judge at hearings to determine whether a committed person has recovered from his mental illness and authorizes the discharge or recommitment of such person, according to the facts. Subsection (4) provides that the circuit judge shall retain jurisdiction of such person "*from the commencement of these proceedings until final discharge . . .*"

So the literal words of the statute authorize a judge of a court (not a circuit court) having jurisdiction over noncapital felonies to perform the following functions which the statute also authorizes a circuit judge to perform, to wit:

(1) Appoint psychiatrists to examine persons concerning their mental condition and to report their findings to the court.

(2) Hold a hearing concerning the mental condition of a person previously committed as a mentally disordered sex offender and either discharge or recommit him.

(3) *Retain jurisdiction* of mentally disordered sex offenders "*from the commencement of these proceedings until final discharge . . .*" (Emphasis supplied.)

Yet the statute does not in so many words prescribe that such other judge may perform the duties which a circuit judge may perform under §917.12(2)(d), F. S., that is, hold precommitment hearings and commit mentally disordered sex offenders for care, treatment and rehabilitation. I think that the true intent of the legislature in enacting Ch. 67-451 Laws of Florida, was to confer these powers on a judge of a court (other than a circuit court) having jurisdiction over noncapital felonies.

If the legislature had intended that only a circuit judge may hold a precommitment hearing and commit a mentally disordered sex offender, then why was authority given to other judges to appoint psychiatrists to make examinations and report to such other judges? I can think of no tenable reason for so doing; if the legislature had entertained such an intent, the reasonable course would have been for it to authorize only circuit judges to appoint psychiatrists and receive reports from them.

If the legislature had meant that only a circuit judge may commit a mentally disordered sex offender, why did it give other judges the authority to undo such commitments by discharging the persons committed by circuit judges? I do not believe that the legislature intended to authorize the other mentioned judges to release committed persons and at the same time withhold from them the power to commit.

And the legislature would not have provided that the judge of a court having jurisdiction of noncapital felonies shall retain jurisdiction of such person "*from the commencement of these proceedings until final discharge*" if it had not intended that such a judge should take jurisdic-

tion at the outset and deal with a mentally disordered sex offender throughout the proceedings, with authority to commit him to an institution as well as to discharge him therefrom when he has recovered.

Further, to hold that the legislature intended that only a circuit judge may commit a mentally disordered sex offender would be to convict it of a gross inconsistency of which it is not guilty. When a circuit court commits such a person, §917.12(4), F. S., requires that it "*shall at all times*" retain jurisdiction of such person from the commencement of the proceedings until final discharge, while subsection (3), read in the light of the above quotation from subsection (2)(a), authorizes judges of certain other courts to hold hearings and discharge or recommit such persons. Manifestly, the circuit court cannot retain jurisdiction over a person committed by it if the judge of another court is free to usurp that jurisdiction and discharge the committed person, but that is exactly what could happen if only a circuit judge could do the original committing. I deem that the true meaning of the statute is that the judge who first assumes jurisdiction of proceedings for the determination of whether or not a person is a mentally disordered sex offender, whether he be a circuit judge or the judge of some other court having jurisdiction of noncapital felonies, retains jurisdiction to commit, recommit and discharge such person.

In *American Bakeries Co. v. Haines City*, 180 So. 524, 532, the Sup. Ct. of Fla. said:

... And as was said by Mr. Justice Whitfield in another case, *People's Bank v. Arbuckle*, 82 Fla. 479, 90 So. 458, 459: "The intent of a statute is the law, and that intent should be duly ascertained and effectuated." This is the fundamental rule of construction to which all other rules are subordinate.

In *State v. City of Miami*, 134 So. 608, 609, the Sup. Ct. of Fla. said:

... If courts were bound to a rigid literal interpretation of terms, there might be substance in this contention; but *it is too well settled for argument that in the application of a statute, if there should be apparent variance between its clear intent and its literal implication, courts will adopt the former rather than the latter application.* (Emphasis supplied.)

and the Sup. Ct. of Fla., further said in *State v. Sullivan*, 116 So. 255, 261:

... In statutory construction legislative intent is the pole star by which we must be guided, and this intent must be given effect even though it may appear to contradict the strict letter of the statute and well-settled canons of construction. The primary purpose designated should determine the force and effect of the words used in the act, and no literal interpretation should be given that lends to an unreasonable or ridiculous conclusion or a purpose not designed by the lawmakers. ...

In the light of the foregoing considerations and authorities, I am of the opinion that the legislature intended by the enactment of Ch. 67-451, Laws of Florida, (§917.12, F. S.) to vest in judges of courts other than circuit courts, having jurisdiction of noncapital felonies, full authority to appoint psychiatrists to conduct examinations and make reports, hold precommitment hearings, commit mentally disordered sex offenders for care, treatment and rehabilitation, and discharge them when they have recovered, to the same extent and in the same manner

as circuit judges are authorized to do. Consequently, I hold the view that the above-quoted provision of §917.12(2)(a), F. S., is properly construed to read as follows:

... If such judge is the judge of a court having jurisdiction to try noncapital felonies, he may proceed in such court in all respects as a circuit judge is authorized to proceed in the circuit court under subsections (2)(c) and (2)(d), and subsections (3) and (4) of this section and exercise the powers, authority and jurisdiction, and shall perform the duties which a circuit judge is authorized to exercise and required to perform in the circuit court.

Therefore, since the judge of a criminal court of record is the judge of a court having jurisdiction of noncapital felonies, the question stated at the beginning of this opinion is answered in the affirmative.

Of incidental concern is the question of whether a mentally disordered sex offender should be committed to the custody of the division of corrections or to the custody of the division of mental health.

Section 917.12(2)(d), F. S., prescribes that the commitment shall be to the custody of the division of corrections "for care, treatment and rehabilitation," and authorizes the director of said division to assign such person to the Florida Research and Treatment Center or to such other facility within the division as indicated in his case. No Florida Research and Treatment Center has been established under the direction of the division of corrections as contemplated by §801.031, F. S., as amended by Ch. 67-516, Laws of Florida, and the division of corrections has no facilities for treating and rehabilitating mentally disordered sex offenders. The legislature took these facts into account when it provided in §917.12(11), F. S., as amended by Ch. 67-451, Laws of Florida, that:

(11) COMMITMENTS PRIOR TO ACTIVATION OF THE FLORIDA RESEARCH AND TREATMENT CENTER.—The director of the Division of Mental Health may receive persons committed under this section until such time as the Research and Treatment Center under the Division of Corrections is established as provided for in chapter 801. The provisions of subsections (3)-(10) of this section shall apply to persons committed to the director of the Division of Mental Health. *When the Florida Research and Treatment Center is fully operative, all persons theretofore committed to the Division of Mental Health under this section shall be transferred to the Florida Research and Treatment Center and be subject to all provisions of chapter 801.* (Emphasis supplied.)

However, I note that the first sentence of said subsection provides that the director of the division of mental health "may" receive persons committed under the section until such time as the research and treatment center under the division of corrections is established as provided for in Ch. 801. If the word "may" were construed to have the meaning which it ordinarily has, it would give the director of the division of mental health the option to decide for himself whether he would receive persons so committed. However, any idea that said director has such an option is negated by the last sentence, which provides that when the research and treatment center is fully operative, "all persons theretofore committed to the division of mental health under this section" shall be transferred to the research and treatment center. Said

last sentence clearly shows that the legislature intended that persons be committed to the division of mental health under §917.12 F. S., as amended by Ch. 67-451, Laws of Florida, prior to the activation of the research and treatment center. And when a commitment is issued to the division of mental health for a mentally disordered sex offender, its director has no option in the matter; his duty is to receive the committed person.

Further, as was said by the Sup. Ct. of Fla. in *Seaboard Airline Railway Co. v. Wells*, 130 So. 587, 593:

The section of the statute above referred to uses the word "may" in designating the matters to be taken into consideration by the commission upon an application; but this court has held that, *where a statute says a thing "may" be done by a public official which is for the public benefit, it is to be construed that it must be done.* . . . (Emphasis supplied.)

It is definitely for the public benefit that the division of mental health receive mentally disordered sex offenders prior to the activation of the research and treatment center because said division does have facilities for dealing with mentally disordered persons while the division of corrections has no such facilities whatsoever. Therefore, applying the doctrine of the *Seaboard Airline Railway Co.* case, the word "may," as used in the first sentence of said subsection (11), is construed to mean "must."

068-22—February 15, 1968

PUBLIC OFFICERS

CREATION OF VACANCY BY RESIGNATION—FILLING OF SUCH VACANCY BY APPOINTMENT, ELECTION

To: *Claude R. Kirk, Jr., Governor, Tallahassee*

QUESTIONS:

1. Was a "vacancy" within the meaning of section 10, Ch. 61-2275, Laws of Florida, created by the resignation of W. D. Allison from the board of trustees of the Indian River County Hospital District?

2. Must notification of such vacancy be communicated to the governor by the board of trustees to begin the running of the 45-day period within which the governor may fill such vacancy by appointment?

3. May a resignation (which has occasioned a vacancy) be withdrawn by the resigner absent the objection of the governor?

Your letter of Dec. 12, 1967, as amended by letter of Jan. 29, 1968, treating of the resignation of W. D. Allison from the board of trustees of the Indian River County Hospital District, poses the above three questions to which I herewith address myself.

AS TO QUESTION 1:

Your first question is answered in the affirmative.

AS TO QUESTION 2:

The statute in point contemplates the occasioning of a vacancy in office by the officeholder's resignation therefrom. The governor is empowered to fill such vacancy by appointment within 45 days "of the occurrence thereof." It is not at all obvious that a further condition

precedent to the governor's power of appointment is notification of such vacancy communicated by the board of trustees to the governor.
AS TO QUESTION 3:

Generally speaking, and absent statutory deviation, a resignation "takes effect at once." 42 Am. Jur. "Public Officers," §137. The vacancy thereupon obtains, 42 Am. Jur. "Public Officers," §131, and the statutorily specified mechanism for replacement of the resigned official is operative.

The great weight of authority is to the effect that one who, by resignation, no longer is entitled to exercise the functions of office may not by exercise of will assume public office.

However, there obtrudes a doubt as to the constitutionality of a material provision of section 10, Ch. 61-2275, Laws of Florida. Indeed, by letter of Jan. 23, 1968, Representative Charles E. Davis, Jr., questions the legislature's constitutional authority to enact legislation authorizing the governor to exercise his appointment power, to fill a vacancy on the board of trustees, within 45 days of said vacancy.

This is not an altogether academic question, for under the terms of Ch. 61-2275, Laws of Florida, a vacancy is to go to election if the governor has not filled same within 45 days of its occurrence. Resolution of the question, therefore, should determine whether the governor is free and able at this time, upon the expiration of the 45 days, to fill the vacancy on the board of trustees.

One prefatory admonition overarches these considerations. Every legislative enactment is presumptively constitutional, and every reasonable doubt is to be resolved in favor of its constitutionality, since the legislature is presumed to intend valid enactments. *Re Knight*, 52 Fla. 144, 41 So. 786; *State ex rel., Flink v. Canova* (Fla.) 94 So.2d 181; 30 Fla. Jur., "Statutes," §64, p. 163. "A statute should be considered constitutional and applied to make it valid and effective. . . ." *State ex rel Young v. Duval County*, 76 Fla. 180, 79 So. 692.

Very much in point is §27, Art. III, State Const., which provides: "The Legislature shall provide for the election by the people or appointment by the Governor of all State and county officers not otherwise provided for by this Constitution, and fix by law their duties and compensation."

The legislature in Ch. 61-2275, Laws of Florida, did precisely that with respect to the Trustees of the Indian River County Hospital District—"officers not otherwise provided for by this Constitution" That is, the legislature provided for election of said officers.

However, the provision of Ch. 61-2275, Laws of Florida, with which we are concerned, and the problem with which we are confronted, relates not to the manner of originally investing one with title to office, but of filling such vacancies as might arise on the board of trustees.

In this respect, §7, Art. IV, State Const., provides: "When any office, from any cause, shall become vacant, and no mode is provided by this Constitution or by the laws of the State for filling such vacancy, the Governor shall have the power to fill such vacancy by granting a commission for the unexpired term." (Emphasis supplied.) This power is, taken together with §1, Art. IV, State Const., the governor's "supreme appointing power." *In re Advisory Opinion to the Governor*, 151 Fla. 44, 9 So.2d 172, and the legislature may not, in the face of the division of powers decreed by Article II of the Constitution, "limit or encroach upon the power of the Governor to appoint officers" *Westlake v. Merritt*, 85 Fla. 28, 95 So. 662, 663. The

governor has in such instances an "exclusive constitutional right of appointment," *ibid.*, upon which the legislature may not trench.

The controlling question, then, is this: Does the constitution or do the laws of the state provide for filling such vacancy as has arisen on the board of trustees? Yes. By §114.04, F. S., the legislature has authorized the governor to fill by appointment vacancies which arise in "state, district or county office . . . until the same shall be filled by an election"

Nevertheless, section 10, Ch. 61-2275, Laws of Florida, qualifies this power by requiring exercise *vel non* of the power of gubernatorial appointment within 45 days of the vacancy, else the office goes to election. Presumably this provision is grounded in the common law rule that the law abhors official vacancies, and that the legislature is warranted in attempting to minimize the duration of those vacancies in statutorily created offices.

The ostensible conflict between §114.04, F. S., and section 10, Ch. 61-2275, Laws of Florida, is moderated by the rule elaborated at 30 Fla. Jur. "Statutes" §115, p. 217:

It is a rule of statutory construction that general and special statutes should be read together, and if possible harmonized. But, in the event of a conflict, the special statute will prevail in the absence of a clear legislative intent to the contrary. The statute relating to the particular part of the general subject will operate as an exception to or qualification of the general terms of the more comprehensive statute to the extent of the repugnancy. . . .

[See *re* Guardianship of Adams (1958 Fla. App.) 99 So.2d 723; *Harley v. Board of Public Instruction* (1958 Fla.) 103 So.2d 111.]

Hence, there remains to be determined whether this legislative enactment runs afoul of the division of powers vouchsafed by Article II, State Constitution, which requires that "the executive power conferred upon the Governor as Chief Magistrate [under §1, Art. IV, State Const.] shall not be exercised by the Legislature" *State ex rel Young v. Duval County*, 76 Fla. 180, 79 So. 692.

The broad descriptive provision of Article II, State Constitution, entails no system of true propositions, i.e., scientifically clinches no argument. As the Supreme Court of Florida observed in the *aforecited* case of *State ex rel Young v. Duval County*, *supra*, p. 697:

The division of governmental powers into legislative, executive, and judicial is abstract and general, and is intended for practical purposes Perhaps there can be no absolute and complete separation of all the powers of a practical government.

Indeed, "[n]either the Constitution nor the common law defines the line of separation between the powers" of the legislature and governor (*State ex rel Young v. Duval County*, *ibid.*), and since the power of appointment is not inherent in the executive but resides where, and is exercised as, the constitution directs (42 Am. Jur. "Public Officers," §§92, 93), we are once again thrown back upon the cardinal constitutional directive, to wit: Section 7, Art. IV, State Const. That source led us, of course, to the controlling statutory enactment, Ch. 61-2275, Laws of Florida, and the circle would therefore seem to be closed. On this interpretation of the law, section 10, Ch. 61-2275, Laws of Florida, would appear not to be constitutionally defective.

068-23—February 15, 1968

COURTS

PART-TIME ASSISTANT PUBLIC DEFENDERS—PRACTICE OF CRIMINAL LAW

To: *Richard O. Watson, Assistant Public Defender, St. Augustine*
QUESTION:

In the light of §27.51(3), F. S., as amended by Ch. 67-539, Laws of Florida, may a part-time assistant public defender practice criminal law otherwise than as such assistant?

Section 27.51(3), F. S., as amended by Ch. 67-539, Laws of Florida, provides that:

(3) The public defender and assistant public defenders shall give priority and preference to their duties under the provisions of this act and may engage in private practice of law only to the extent that it will not interfere with or prevent performance of their duties as public defender and assistant public defenders and shall not otherwise engage in the practice of criminal law.

Prior to 1967, said subsection contained the same provisions insofar as the public defender was concerned. The only change made in 1967 was to make its provisions applicable to assistant public defenders as well as to public defenders.

In AGO 063-81, Biennial Report of the Attorney General 1963-1964, p. 127, my predecessor in office, Hon. Richard W. Ervin, held that said statutory provision prohibited a public defender from engaging in the practice of criminal law otherwise than in his capacity as public defender. In AGO 067-8, I expressed agreement with said ruling.

Since at that time the public defender law contained no intimation that an assistant public defender was to be prohibited from engaging in the private practice of criminal law, I ruled in AGO 067-8 that he was free to do so.

However, soon after my opinion was rendered, the 1967 Legislature amended §27.51(3), F. S., so as to place assistant public defenders in the same position as public defenders insofar as the private practice of criminal law is concerned, that is to say, it continued the prohibition as to public defenders and extended it to assistant public defenders.

As thus amended in 1967, §27.51(3), F. S., makes no distinction between full-time assistant public defenders and part-time assistant public defenders, or between those paid from state funds and those paid from county funds. It applies to all assistant public defenders. Your question is answered in the negative.

068-24—February 20, 1968

PUBLIC OFFICERS

CONSTRUCTION OF §112.061(13), F. S., ENACTED BY CH. 67-2206, LAWS OF FLORIDA—ADVANCE PAYMENT OF PER DIEM AND TRAVEL EXPENSES

To: *Fred O. Dickinson, Jr., State Comptroller, Tallahassee*
QUESTION:

May a state attorney's investigator receive advance pay-

ment of certain expenses to be incurred in attending a training program at the FBI Academy?

Your question is answered in the negative.

Undeniably the travel of the investigator to the FBI Academy may be an important part of his advanced law enforcement training and so long as it is properly authorized and budgeted there can be no objection to his attendance. The issue here is limited to whether moneys can be advanced in contemplation of certain expenses. Prior to the amendment my position was expressed in AGO 066-105, Biennial Report of the Attorney General 1965-1966 "... the statutes (F. S. 112.061) clearly contemplate a reimbursement of such costs and expenses, and not an advance of funds with which they may be paid. . . ." (Emphasis supplied.)

The term, "law enforcement," can be construed to include many areas and certainly advanced training for investigators may be so included. However the language herein further narrows the class of persons who become eligible by the words "... whose duties . . . require such travel" preceding and following the classification. It is not enough therefore to be in the performance of a law enforcement function. The statute insists that it be a duty and that said duty require travel. Attendance at a school may be one of the functions of employment but it does not fulfill the standard as contemplated by the statute.

From a reading of the amendment in its entirety it would appear that the legislature intended for the policy of reimbursement to generally prevail. Advances are to be confined only to law enforcement officers in the continuing pursuit of their regular duties (such as transporting prisoners) to avoid suffering the financial discomfort of having to advance their own funds while performing state requirements.

I must therefore conclude that an investigator attending a training school can only receive funds for per diem and travel through reimbursement and not under the provisions of Ch. 67-2206, Laws of Florida.

068-25—February 26, 1968

TAXING DISTRICTS

EASTPOINT SEWERS AND WATER DISTRICT, FRANKLIN COUNTY—CONSTRUCTION OF CH. 67-1399, LAWS OF FLORIDA—LEVYING OF TAX—EXEMPT PROPERTY—TAX MILLAGE RESOLUTION, ETC.

To: C. H. Bourke Floyd, Attorney for Eastpoint Sewer and Water District, Apalachicola

QUESTIONS:

1. In section 9, Ch. 67-1399, Laws of Florida, said law authorizes up to a 5 mill levy on all taxable property within the district. Please advise if the taxable property for water and sewer improvement includes homesteads.

2. Advise if there is a date certain by which the resolution of the millage in setting the Eastpoint Water and Sewer District (rate) has to be filed with the board of county commissioners, the tax collector and assessor of the county. To restate the question, must the District file its resolution setting the mills to be levied on a date certain?

3. If the district files its resolution in Jan. or Feb. 1968,

how soon may the district expect to receive the taxes for such levy?

4. Is the district authorized to borrow money, for example, to provide operating necessary funds until taxes are collected?

The governing board of the sewer and water district consists of 5 members to be appointed by the governor, each such member to be a freeholder and qualified elector of the district, which district embraces the real properties set out in section 2, Ch. 67-1399, Laws of Florida. This district differs little, if any, from other districts set up by the legislature for like and similar purposes in other counties of the state. These districts are in the nature of public corporations, subject to the rules of law applicable to such institutions. Although not set up by the State Constitution, special taxing districts, not being prohibited by the State Constitution, may be set up and established by the legislature so long as constitutional provisions are not violated. Chapter 67-1399, insofar as its establishment as a public corporation not being prohibited by the State Constitution, was authorized so long as there is no violation of other constitutional requirements.

Among other things, section 9, Ch. 67-1399, Laws of Florida, provides that: "... all taxable property within the district shall be subject to an ad valorem tax not to exceed five (5) mills of the assessed valuation of such property to be used to carry out the purposes ..." of said act. Section 7, Art. X, State Const., provides for the "... exemption from all taxation, except for assessments for special benefits ..." of all homesteads in Florida. Generally a tax based upon the valuation of real property is considered to be an ad valorem tax, unless it otherwise appears from the statutes imposing such tax. (See *State v. Dreka*, 135 Fla. 463, 185 So. 616). The tax to be imposed under section 9, Ch. 67-1399, is clearly an ad valorem tax. Homestead properties, by reason of §7, Art. X, State Const., are not taxable properties within the purview and intention of section 9, Ch. 67-1399. Homesteads are excluded from said section 9, Ch. 67-1399, by reason of section 7, Art. IX, State Const. Although this section provides for ad valorem taxes not exceeding 5 mills of the assessed value of the properties taxed, taxing procedures are not set out in detail. The extent of the provisions in said section 9, Ch. 67-1399, provides for a district board meeting in January of each year to fix a millage not to exceed 5 mills on the dollar of tax valuation.

We turn to Ch. 193, F. S., where the procedures for the taxation of taxable properties are provided. The first of such procedures is the fixing of the valuation of the taxable properties for purposes of taxation by the tax assessor. Under §193.25, F. S., this is required to be completed by the first Monday in July of the tax year when the said valuations come before the board of county commissioners as a county board of tax equalization, after which such valuations, as equalized, become final as the tax valuations for that tax year. When these tax valuations become final, the tax valuations for the county and each taxing district or authority, are calculated and determined, with the county and each taxing district or authority being furnished a copy thereof. This is usually done sometime in July.

The county and the taxing districts and authorities, after the making up of their budgets for their next fiscal year and finally approving them, and using the said budgets together with the tax valuations as certified to them by the county assessor of taxes, determine the millage

necessary to produce the amount of their budget. This becomes the millage necessary to be levied in order to produce the amount of their budget. There is some confusion in this connection in section 9, Ch. 67-1399, Laws of Florida, especially where said law requires that: "In January, 1968, and in each January thereafter the district board shall meet and determine the millage necessary to provide funds to be levied and assessed on such property to carry out the purposes of this act; . . ." The said board could in January of each year probably determine and fix a budget for the district, but cannot determine the millage to be levied to produce that budget until tax valuations have been determined and equalized as provided in §193.25, F. S., which is not usually before the first Monday in July of the tax year. I am inclined to construe the reference to a meeting in Jan. 1968, and each January thereafter, for the purpose of determining the millage to be levied, as a reference to the preparation of the district budget and not the fixing of the millage. Under present statutes this cannot be done until after the July equalization meeting provided for in §193.25, unless the district prepares and equalizes its own tax roll, and this is clearly not the intention of Ch. 67-1399.

The district board should determine the amount of its operations budget for the next fiscal year, for which taxes must be levied, which may normally be done at any time prior to the fixing of the millages, which, in the counties, is usually sometime around the first Monday in July of the tax year when the tax valuations are made and determined. I do not think that the district board could legally fix a millage until after tax equalization, which is usually in July, for the reasons aforesaid. Taxes levied under section 9, Ch. 67-1399, Laws of Florida, are assessed on the county tax roll and are levied on the county tax roll, and are not due and payable until around Nov. 1 of the tax year.

I find no authority in the district board (under Ch. 67-1399, Laws of Florida) to borrow money and pledge for the payment of such loan ad valorem taxes imposed under and pursuant to section 9, Ch. 67-1399, except to the extent provided by section 8, subsection (14), Ch. 67-1399, for obtaining loans from the federal government.

Briefly, the tax imposed by section 9, Ch. 67-1399, Laws of Florida, is an ad valorem tax, from which homesteads are exempt under §7, Art. X, of the State Const. Millage resolutions by the district are directed to the county commissioners, as authorized by §193.25, F. S., which by the very nature of things may not become operative until after the equalization of the county tax rolls, pursuant to §193.25, and the certification of the district tax valuations by the county assessor to the said district. The filing of the tax millage resolution is merely a step in the process of taxation dependent upon other statutes and procedures. Normally funds from such taxes will not be available to the district until on or after Nov. 1 of the tax year. From Ch. 67-1399 I find no authority in the taxing district to borrow moneys on the credit of such taxes prior to their payment.

068-26—February 28, 1968

JUSTICES OF THE PEACE

FEES—DISPOSITION WHERE THE WARRANT IS ISSUED BY A
JUSTICE OF THE PEACE IN A DISTRICT OTHER THAN
HIS OWN AND CASE TRIED BY PROPER DISTRICT
JUSTICE OF THE PEACE*To: Norton Josephson, Justice of the Peace, Daytona Beach*

QUESTION:

Where a justice of the peace issues a warrant in the absence or unavailability of the justice of the peace in whose jurisdiction the offense allegedly took place, said warrant made returnable to the proper justice of the peace, who thereupon disposes of the case, which justice of the peace is entitled to the \$6.50 statutory fee, or are both justices of the peace entitled to the sum of \$6.50 each?

Section 1, Ch. 61-1646, Laws of Florida, provides in part as follows:

Upon the institution of any criminal action or proceeding before the justice of the peace in any county of the state having a population of not less than one hundred twelve thousand (112,000) and not more than one hundred seventy thousand (170,000) according to the latest official decennial census, there shall be paid to the justice of the peace in any such county, as and for fees for all such services to be performed by him in such criminal action or proceedings, in lieu of all other fees heretofore charged, the sum of six dollars and fifty cents (\$6.50) for each defendant against whom any criminal action or proceedings are instituted before said justice of the peace. Said fee hereinbefore provided shall be paid by the board of county commissioners of each such county immediately upon the institution of such proceedings before said justice of the peace, without regard to whether an information is filed or an indictment found against the defendant in such case.

This section specifically provides that a flat fee of \$6.50 shall be payable to a justice of the peace upon the institution of any criminal action or proceeding. The flat fee of \$6.50 is in lieu of all other fees heretofore paid and is for "all such services to be performed by him in such criminal action or proceeding." Clearly the legislature did not intend that 2 fees of \$6.50 each should be paid to different justices of the peace who may be legally involved in the same criminal action or proceeding. A criminal action or proceeding is instituted by the issuance of a warrant of arrest.

Section 937.02, F. S., dealing with proceedings and trial in courts of county judges and justices of the peace, provides in part:

Upon complaint made on affidavit to any justice of the peace by any person, that any offense which he has jurisdiction to try and determine has been committed within his district, he may issue a warrant in the usual form, making it returnable either before himself or before the county judge.

This section specifically provides that a justice of the peace may issue warrant of arrest and make same returnable before himself or the

county judge when a complaint has been made on affidavit that an offense has been committed in his territorial district of which he has trial jurisdiction. The two primary requisites under this statute are that the offense is within the justice of the peace's jurisdiction to try and determine and that the offense has been committed within the justice of the peace's district. When these two elements are present and complaint is made on affidavit, there can be no question but that the justice of the peace may issue warrant of arrest and make same returnable to himself or the county judge.

Chapter 901, F. S., pertains to criminal procedure in arrests and §901.02, F. S., entitled "When warrant of arrest to be issued" provides as follows:

... "A warrant may be issued, for the arrest of the person complained against if the magistrate, from the examination of the complainant and the other witnesses, if any, has reasonable ground to believe that any offense was committed within his jurisdiction and that the person against whom the complaint was made committed it; provided, however, that a warrant may be issued by said magistrate for the arrest of the person complained against, upon presentation to him of affidavits sworn to by the complaining witness or witnesses before the prosecuting attorney, provided such prosecuting attorney is authorized to administer oaths as a notary public or otherwise.

This section appears to apply to offenses committed within a justice of the peace's territorial jurisdiction but outside his trial jurisdiction. In these instances the justice of the peace or the county judge sits as a committing magistrate. However, before the magistrate issues the warrant of arrest he must have reasonable ground to believe that the offense was committed "within his jurisdiction." The jurisdiction referred to pertains to the territorial boundary from which he is elected or appointed to serve.

The provisions of §§937.02 and 901.02, F. S., pertain to the issuance of warrant prior to and in the absence of arrest. The fact that the offense for which a warrant is applied for prior to arrest must be committed within a justice of the peace's territorial jurisdiction regardless of whether the justice of the peace may have or may not have trial jurisdiction of the offense appears to be the clear intent of the legislature inasmuch as they specifically provided for an exception in §901.08(1), F. S., as follows:

... When a complaint is made before a magistrate of the commission of an offense which is punishable by death or imprisonment for more than five years and is triable in another county of the state, but it appears that the person against whom the complaint is made is in the county where the complaint is made, the same proceedings for the issuing of a warrant shall be had as prescribed in this chapter, except that the warrant shall require the person, against whom the complaint is made, to be taken before a named or otherwise designated magistrate of the county in which the offense is triable.

This section, which is an exception to the general requirement that the offense must be committed in a justice of the peace's territorial jurisdiction in the issuance of a warrant prior to arrest, authorizes the justice of the peace to issue warrant of arrest for an offense committed in another county which is punishable by death or imprisonment for more

than 5 years, provided the person complained against is in the county wherein the complaint is made. The requirements under this section are that the (1) offense was committed in another county and is (2) triable in another county and that (3) the offense is punishable by death or imprisonment for more than 5 years and that (4) the person against whom the complaint is made is in the county where complaint is made. Thus, it would clearly appear, that this exception covers only those infamous felony, murder and rape offenses and would not apply to misdemeanors or felonies wherein the punishment is less than 5 years' imprisonment. In acting under this exception the justice of the peace shall make the warrant returnable to a named or otherwise designated magistrate of the county in which the offense is triable.

Section 901.06, F. S., outlines the duty of an officer after arresting with warrant, as follows:

... When the arrest by virtue of a warrant occurs in the county where the alleged offense was committed and where the warrant was issued, the officer making the arrest shall without unnecessary delay take the person arrested before the magistrate who issued the warrant or, if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county.

This section should be read in conjunction with §901.02, F. S., and covers those instances wherein a warrant has been issued prior to arrest for an offense committed in the issuing justice of the peace's territorial jurisdiction. In the issuance of a warrant before arrest, the offense must be committed within the territorial jurisdiction of a justice of the peace except as specifically provided for in §901.08(1), F. S.

Section 901.23, F. S., sets forth the "duty of officer after arrest without warrant" as follows:

... An officer who has arrested a person without a warrant, shall without unnecessary delay take the person arrested before the nearest or most accessible magistrate in the county in which the arrest occurs, having jurisdiction, and shall make before the magistrate a complaint, which shall set forth the facts showing the offense for which the person was arrested; or, if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county.

Thus, it appears that it was the intent of this section that all persons arrested without warrant be taken without unnecessary delay before the nearest and most accessible magistrate having trial or territorial jurisdiction and make complaint upon which the arrest was made. If the magistrate having trial or territorial jurisdiction is absent or unable to act, then the person arrested should be carried before the nearest or most accessible magistrate in the same county, whether justice of the peace or county judge. It is the duty of the magistrate with regard to each person arrested with or without a warrant and brought before him on an offense which he is not empowered to try to immediately, under §902.01, F. S., inform him: "(1) Of the charge against him, (2) Of his right to the aid of counsel during the preliminary examination, (3) Of his right to waive such examination, and (4) Of his right to refuse to testify, and also caution him that in the event he does testify, anything which he says may be used against him in a subsequent proceeding."

If the magistrate of the district in which the offense is committed is absent or unable to act, then the arrested person shall be carried to

the nearest and most accessible magistrate in the county which shall receive complaint and if satisfied that probable cause exists that the offense was committed, issue warrant of arrest and make it returnable to the justice of the peace having territorial jurisdiction or the county judge.

In the case of *State v. Robinson*, 132 So.2d 156, the court pointed out that it has long been the policy of the court in all cases wherein a justice of the peace was unable to act because of absence, sickness, disqualification or other disability to designate other justices of the peace, or qualified judge to act for him as provided for in the provisions of §2, Art. V, State Const. However, in order to clear up any ambiguity in the rules, the court amended the last paragraph of subsection (4) (i) of Florida Appellate Rule 2.1 to read as follows:

... When any justice of the peace of this state is unable to perform the duties of his office because of absence, sickness, disqualification or other cause or when necessary for the prompt dispatch of business of said court, the said justice of the peace or his clerk, if he shall have such, shall advise the chief justice who may assign any other justice of the peace or any judge (except Supreme Court justices, district court of appeal judges or circuit judges) of any other court of this state having the same or greater jurisdiction to perform the duties of said justice of the peace for such time as the chief justice may direct.

Therefore, based upon the above cited statutes and court decisions, it is my opinion that only one flat fee of \$6.50 is authorized to be paid by the board of county commissioners in any single criminal action or proceeding instituted before a Justice of the Peace, Volusia County.

The Justice of the Peace, Volusia County, entitled to the flat fee of \$6.50 upon the institution of a criminal action or proceeding must of necessity depend upon the facts and circumstances in each individual action or proceeding. However, a strict interpretation of Ch. 61-1646, Laws of Florida, would indicate that the flat fee of \$6.50 should be paid to the justice of the peace before whom the original criminal action or proceeding is legally initiated.

In those instances where 2 or more justices of the peace are legally involved in a single criminal act or proceeding there does not appear to be any prohibition against the justices of the peace agreeing to an equitable prorated distribution of the \$6.50 fee.

068-27—February 28, 1968

AUTOPSIES

AUTOPSY REPORT—RELEASE TO DECEASED'S PERSONAL REPRESENTATIVE, WHEN PERMITTED

To: *Dominick J. Salfi, State Attorney, Sanford*

QUESTION:

Is the county medical examiner or a pathologist authorized to release to a deceased person's personal representative a copy of an autopsy report that has been performed at the request of a state attorney?

State attorneys have statutory authority to authorize postmortem examinations where such is deemed to be necessary for the purpose

of determining whether or not death was criminally caused. Section 932.57, F. S.

Section 458.16, F. S., has to do with reports of examinations made of living persons and would not, therefore, be controlling as to the release of autopsy reports.

Since §119.01, F. S., declares that all state, county and municipal records shall be open for personal inspection by any citizen of this state, it seems appropriate to determine just what constitutes a "public record." The latest expression from this office involving a construction of said statute is found in AGO 065-23, Biennial Report of the Attorney General 1965-1966 where I had this to say:

... "A public record, strictly speaking, is one made by a public officer, in pursuance of a duty, the immediate purpose of which is to disseminate information to the public or to serve as a memorial of official transactions for public reference. . . ." (State v. Brantley, 201 Ore. 637, 271 P.2d 668, text 672 and 673) "Every memorandum made by a public officer is not a public record; papers or memoranda in the possession of public officers which are not required to be kept by them as official records, are not public records." (76 C.J.S. 113, §1, notes 14 and 15).

Assuming an autopsy report requested by a state attorney to be a public record within the meaning of the above stated definition, the conclusion does not follow that the right of inspection extends thereto. In the case of Lee, City Manager, *et al.* v. Beach Pub. Co., 173 So. 440, text 442, the Sup. Ct. of Fla., had this to say:

... The appellant contends that there are certain records in the police department of a city which must be kept secret and free from common inspection as a matter of public policy. This is true. The rule as stated in 23 R.C.L. 161, is as follows:

"The right of inspection does not extend to all public records or documents, for public policy demands that some of them, although of a public nature, must be kept secret and free from common inspection, such for example as diplomatic correspondence and letters and despatches in the detective police service or otherwise relating to the apprehension and prosecution of criminals."

Generally, public records are subject to the right of inspection and publication. However, such right does not apply to all public records because public policy and common sense require that some, although of a public nature, be kept secret and free from public inspection. *Patterson v. Tribune Co.*, 146 So.2d 623 (2 D.C.A. 1962). The foregoing is in harmony with the rule set forth in 76 C.J.S. Records, §36, pp. 139, 140, where the text reads:

On the other hand, various records have been held not subject to inspection, . . . records in the offices of those charged with the execution of the laws relating to the apprehension, prosecution, punishment, or parole of criminals; and generally records inspection of which would be detrimental to the public interest or is specifically exempted or prohibited by statute.

To the same effect, see 45 Am. Jur. Records and Recording Laws, §26, p. 433; *State v. Mattio*, 212 La. 284, 31 So.2d 801, *cert. denied* 332 U.S. 818.

In the case of *People v. Preston*, 176 N.Y.S.2d 542 (1958), the Kings County Court had occasion to construe a provision of the city charter providing that records of the chief medical examiner should not be open to public inspection where there was an indication of criminality. The court stated as follows: "Autopsy reports where no evidence of criminality is indicated are public records available to all. Where criminality is indicated, such reports are not available to the public but are available to any defendant by order of a Court."

In view of the foregoing, it is difficult for me to see what standing the deceased's personal representative would have to justify his request for a copy of the autopsy report. He did not request that the autopsy be performed. His consent for the performance thereof would not be necessary. He is not liable for the cost thereof. He is in no way a party to the contractual relationship between the state attorney who authorizes the postmortem examination and the doctor who performs same. This is not to say, however, that the state attorney may not authorize the release of such report to the personal representative of the deceased. But, in my opinion, this would be the only way he would be entitled to receive a copy of said report in the absence of a court order. Accordingly, your question is answered in the negative.

068-28—February 28, 1968

COURT COSTS

COURT REPORTER'S FEE FOR REPORTING HEARING ON MOTION TO SUPPRESS EVIDENCE AS ITEM OF COST RECOVERABLE BY DISCHARGED DEFENDANT

To: *Warren H. Edwards, Judge, Criminal Court of Record, Orlando*

QUESTION:

Upon a nolle prosequi resulting from granting of a motion to suppress evidence is a nonindigent defendant entitled to reimbursement from the county for the cost of reporter's fees incurred by him in connection with the hearing on such motion?

It appears from your question that the official court reporter of your court did not take the testimony at such hearing at your direction, but rather that the nonindigent defendant employed a private reporter of his own choosing and now seeks to recoup this expense upon being discharged.

A rule of thumb which epitomizes the law of costs in criminal cases is the following: "It is indispensable for every claimant to be able to point to the statute which entitles him to receive what he claims." (15 C.J. 318, §788) (Emphasis supplied.)

The reason for this is that costs were unknown at common law, and hence the recovery and allowance of costs—the right to or liability for—rest entirely on statutory provisions. 20 C.J.S. 677, §435; *Lindsey v. Dykes*, Fla., 175 So. 792; *Buckman v. Alexander*, Fla., 3 So. 817; *Arnold v. State*, Wyo., 306 P.2d 368.

This rule applies to counties, and a court has no discretion to impose costs in circumstances not provided for by statute. Unless so authorized, therefore, stenographer's fees are not taxable. 20 C.J.S. 695, §454; *Brown v. State*, Fla., 32 So. 107.

This rule of the common law that costs in criminal cases were

taxable against neither party was modified in early times in Florida by certain statutory provisions and by §9, Art. XVI, State Const.

Chapter 939, F. S., represents the modern surviving enunciations of these legislative enactments, providing generally for the charging of the "costs of prosecution" against a defendant upon conviction or against the county in cases where a defendant was insolvent or acquitted or discharged.

Section 939.06, F. S., however, is the only section which permits recovery by a defendant from the county of any taxable item of cost that he may have prepaid in the trial court. Section 939.12, F. S., relates to costs on appeal.

By virtue of §14, Declaration of Rights, State Const., "... No person shall be compelled to pay costs except after conviction, on a final trial."

It is thus evident that generally a defendant can never be compelled to prepay any item of taxable costs prior to his conviction. This practically eliminates the possibility that if acquitted or discharged at the trial level, he will have any sums invested in taxable items of costs as to which, under §939.06, F. S., he will be entitled to a refund.

The only case that comes to mind is where a defendant advances the expenses of summoning his witnesses and is then acquitted. Under *Buckman v. Alexander*, Fla., 3 So. 817, he would be entitled to have these sums repaid by the county. See also *DeSoto County Commissioners v. Howell*, Fla., 40 So. 192.

The constituent sections of Ch. 939, F. S., were enacted at a time when those who served our criminal courts, such as justices of the peace, constables, sheriffs, clerks and possibly others, were strictly on a fee basis, with a set fee allowable to them by statute for the various special services they performed in a criminal prosecution. These together with fees and mileage allowances for witnesses were the "costs of prosecution" referred to in our statutes as chargeable against the defendant if convicted or against the county if the defendant was insolvent or acquitted or discharged.

The fee system continues in some counties but in many others has been replaced by a set salary to the officer. Where the fee system is no longer in use, it appears that ordinarily the sheriff's office will make book entries as to possible taxable costs. In the event such items become chargeable to the defendant upon conviction, they would be collected upon taxing of costs by the court against such defendant. On the other hand, should the defendant be acquitted, these entries remain bookkeeping entries, since the county no longer will pay these specific items of cost to the sheriff where he is on a salary basis. In the event a defendant has in some manner expended taxable costs, such as through deposits for summoning of witnesses, it would appear these sums could be recovered by an acquitted or discharged defendant through taxation by the court. In this situation it would appear the sheriff would return such deposits to the freed defendant and charge his fine and forfeiture fund. Local county practices may vary.

However, nothing in Ch. 939, F. S., or in §9, Art. XVI, State Const., gives any statutory basis for a nonindigent defendant in a criminal court of record to recover from the county upon his acquittal or discharge any sum expended in his defense except a taxable item of cost that he has prepaid.

Court reporters, as is evident, are an indispensable arm of our modern courts. However, their widespread use in our courts is a fairly modern phenomenon.

As pointed out by the United States Supreme Court in *Miller v. United States*, 317 U.S. 192, 87 L. Ed. 179, there were at that time no provisions in our federal laws requiring that a court reporter be present at trials. If present, they were to be paid privately by the parties upon agreement. In *United States v. Stirone*, 222 F. Supp. 507, the district judge, noting that a constitutional criminal trial does not require that the testimony be stenographically transcribed, pointed out that it was only in 1944 that 28 U.S.C. 753 (b), the Court Reporters' Act, required the presence of court reporters at proceedings in federal criminal cases. See also *Tucker v. State, Tenn.*, 361 S.W.2d 494; *Grove v. State, Tenn.*, 365 S.W.2d 871; *Commonwealth v. Kimble, Pa.*, 144 A.2d 598; *Bowles v. Malone, Ga.*, 76 S.E. 854; 65 A.L.R.2d 854.

There is accordingly no requirement in Florida that a criminal trial in the criminal court of record or proceedings preliminary thereto be reported by a court reporter, official or otherwise, unless our statutes require it or permit it to be required by the judge or the parties.

In this connection Ch. 29, F. S., contains provisions relating to the duties and entitlement to fees of official circuit court reporters in the several judicial circuits.

On the other hand official court reporters of our criminal courts of record are governed, so far as appears, by legislation of local application, the details of which vary in the several acts. See *State ex rel., Edwards v. Tippet, Fla.*, 134 So. 52, for example.

Chapter 65-887, Laws of Florida, appears to be our present law governing the duties, fees and functions of the official court reporter of the Criminal Court of Record of Orange County.

The court reporter in your court performs his duties at the direction of the judge. The reporter must attend court on all plea days unless excused. He must report "such proceedings as the judge of said court may direct." He has certain duties with reference to reporting the trials of indigents, but is allowed extra fees for this purpose. If ordered by the presiding judge, he shall report the opening and closing arguments of counsel and voir dire examinations, and again he is allowed extra fees, which, as to a nonindigent defendant who is later convicted, would become an item of cost chargeable against such defendant. It would appear that as to reporting arguments of counsel and voir dire examinations the presiding judge would be guided by the requests of counsel so that a nonindigent defendant could avoid this additional item of cost if he so chose.

There is nothing in Ch. 67-887, Laws of Florida, or elsewhere in our law that states that a nonindigent defendant is entitled to have a court reporter at a pretrial hearing on motion to suppress evidence in your criminal court of record at public expense. If he does and is later discharged or acquitted, he will not become entitled to recover this expense from the county, since it is not a taxable item of cost provided for by statute.

This is clear, further, from the fact that if the trial judge required the official court reporter to attend and take such a hearing, the reporter would perform the service in return for his salary and would not be entitled to a fee that would become an item of cost to be charged against the defendant should he be later convicted.

As is stated in 15 C.J. 334, §836: "Ordinarily, statutes imposing payment of costs on a county do not render it liable for costs made by a defendant. These items of cost are not taxable against a county under a statute designating the costs for which the county shall be liable as 'costs of prosecution,' as 'all costs' or as 'costs'."

The only exception to this rule in Florida that I find is the fees and mileage advanced by a defendant to summon his own witnesses where he is later acquitted or discharged. By virtue of case law (*Buckman v. Alexander, DeSoto County Comm'rs. v. Howell, supra*) such prepaid witness fees and mileage are recoverable upon acquittal or discharge. Otherwise the rule quoted above at 15 C.J. 334, §836, appears to stand as the law of Florida also.

As stated at the beginning: "It is indispensable for every claimant to be able to point to the statute which entitles him to receive what he claims."

I find no statutory or constitutional provision which would permit a nonindigent defendant in your court to recover from the county the expense of a court reporter employed by him to take the testimony at a pretrial hearing on a motion to suppress evidence even though his motion be granted and he is thereupon discharged. The item is not specifically made a taxable item of cost by our law.

The new Florida Rules of Criminal Procedure, effective Jan. 1, 1968, particularly as to Rule 1.190(h), do not appear to affect the above conclusion in any way. Rule 1.220(i), referring to costs incurred in connection with the new discovery provisions, states that reasonable costs incurred thereunder shall be taxed as costs against the county only after a defendant is adjudged insolvent. Your question is answered in the negative.

068-29—February 28, 1968

STATE PROPERTY

SURPLUS PROPERTY—RESTRICTION ON SALES THEREOF TO SPECIFIC GROUPS PROHIBITED

To: C. H. Coulter, State Forester, Tallahassee

QUESTION:

Is it legally permissible under Ch. 273, F. S., to restrict the sale of surplus property to special groups?

Preferatory to stating the above question you indicated the Florida Board of Forestry is contemplating accepting bids only from authorized automobile dealers. Presumably, your question is concerned with the sale of surplus automotive equipment. However, my answer is applicable as well to sales of other types of surplus tangible personal property owned by the state.

Section 273.05, F. S., provides for the classification of property as surplus by the custodian. Section 273.07, F. S., provides that such property, except surplus property of a value of \$5,000 or more, which requires prior approval of the State Planning and Budget Commission, may be disposed of for value (1) to any person upon bids, or (2) to any governmental agency as defined by §1.01(10), F. S., without bids, or, if the said property is without commercial value, it may be donated, destroyed, or abandoned. With reference to sales upon bids (all sales except sales to governmental agencies), §273.07, F. S., sets forth further special instructions, viz.:

... Property the value of which is estimated to be between one hundred dollars and two hundred dollars shall be sold only to the highest responsible bidder after a request for

at least three bids, or by public auction. Any sale of property the value of which is estimated to be two hundred dollars or more shall be sold only to the highest responsible bidder, or by public auction, after publication of notice not less than one week nor more than three weeks prior to sale in a newspaper having a general circulation in the county where the property is to be sold, and in additional newspapers if the custodian thinks the best interests of the state will better be served by the additional notices.

Your question is answered in the negative. The sale of surplus property of the estimated value of between \$100 and \$200, must be to the highest responsible bidder, accepted after requesting the required number of bids or to the highest responsible bidder who bids after published notice for bids on property of a value over \$200, or to the highest responsible bidder at a public auction.

068-30—February 29, 1968

STATE PURCHASING COMMISSION

CITRUS COMMISSION—APPLICATION OF CH. 287, F. S. AND REGULATIONS ADOPTED BY THE PURCHASING COMMISSION

To: Edward A. Taylor, General Manager, Florida Citrus Commission, Lakeland

QUESTIONS:

1. Is the citrus commission, as an agency, within the scope of the purchasing commission's authority?
2. Is the automobile of the citrus commission exempt by virtue of an exclusion in the purchasing commission's act?

The scope of Ch. 287, F. S., is wide, pertaining to "... all the various state agencies, officers, departments, boards, commissions and institutions." (§287.011(1), F. S.)

The various sections of the chapter invariably employ language of equal scope, such as in §287.061(1), F. S., which states: "The purchasing commission shall adopt purchasing regulations governing the purchase by any agency of any commodity or commodities and establishing standards and specifications for a commodity or commodities . . . based upon a determination by the purchasing commission . . . that such action is reasonable and practicable and advantageous to promote efficiency and economy . . ."

Similarly, §287.061(2), F. S., empowers the purchasing commission to: "... by regulation or order correct any practice that appears contrary to this chapter or to the best interests of the state. . . ." Therefore, it is clear that the purchasing commission has the power to issue such regulations.

The question as to whether the citrus commission, as an agency, is within the scope of the purchasing commission's authority was specifically answered by the Supreme Court of Florida in *State ex rel. Arthur Kudner, Inc., v. Lee*, 150 Fla. 35, 7 So.2d 110 (1942), in which the Supreme Court was asked to rule on whether printing purchased by the commission came within the rules of Ch. 283, F. S., pertaining to purchasing of printing by state agencies. The Court stated:

The Legislature levied the excise tax on each standard box

of grapefruit, oranges and tangerines, and clothed the Citrus Commission with the power to collect and transmit the amount collected to the State Treasurer. While these funds were earmarked, the expenditure thereof by the Citrus Commission was authorized only for purposes enumerated by the Act, and broad, liberal, comprehensive and discretionary powers are granted the Commission for the advertisement of citrus fruit; the several media for advertising are broad and if the Commission concludes that the interest of the industry would be promoted by utilizing space in newspapers, magazines, trade papers, bill boards, card space, or by purchasing time for radio broadcasts, and other media, then such activities would be clearly within the legislative mandate. The Act confers on the Citrus Commission the power of sovereignty, establishes a State agency, and creates State officials, and the authority to expend or disburse the funds raised by taxation must be for the specific purposes enumerated in the Act.

If the commission is a state agency under Ch. 283, F. S., it is also a state agency within the meaning of Ch. 287, F. S.

The remaining question is whether the citrus commission automobile itself is exempted by virtue of an exclusion in the Purchasing Commission Act.

In his letter to you, Mr. Day indicated the issue is only whether the Florida Citrus Commission is within the jurisdiction of §287.061(3), F. S. Unfortunately, this may have misled you. As §287.061(1) and (2) indicates, the pertinent parts of which are quoted above, the purchasing commission probably had the authority without subsection (3) to issue the purchasing regulations that would apply to the citrus commission automobile, since it is a commodity like any other.

My office rechecked Mr. Day's letter with his office. Mr. Crona, his assistant, said that in fact his office was of the opinion the sole question was whether the citrus commission is within the purview of the entire chapter. Note also that the authority cited by Purchasing Commission Regulation No. 300-1.03 itself cites said subsections (1) and (3) as authority.

I also considered the possibility that subsection (3) may operate as a limitation rather than an extension of the authority of the purchasing commission. While such an interpretation is doubtful, even under this interpretation, the citrus commission comes within the authority of the purchasing commission for the following reasons.

As you correctly pointed out, §287.061(3), F. S., is limited to the jurisdiction formerly held by the Budget Commission. This is, however, an extremely clouded and confusing subsection. It was originally enacted in 1953, tacked on to the general appropriations act of that year. It was codified at that time as part of Ch. 116, F. S., 1953, a general, catchall chapter dealing with "Powers and Duties of Officers." Later §287.061(3), F. S., was transferred to Ch. 216, the Budget Commission Act. At that time, said section applied to "any department or branch of the state government."

In 1957, the purchasing commission replaced the old purchasing council; in 1959, this section was repealed and a very similar section enacted as §287.061(3), F. S., with phraseology limiting the purchasing commission to such "... jurisdiction ... heretofore vested by law in the state planning and budget commission ...". The subsection goes on to say, however, "Such purchases made by any officer, board, agency,

department or branch of state government shall be subject to the approval of the state purchasing commission."

The original section, if construed standing alone, conferred jurisdiction over "any department or branch of the state government." If the section is construed as part of the general jurisdiction of the State Planning and Budget Commission, it again would include the citrus commission because the State Planning and Budget Commission's jurisdiction extends to all state agencies "created by legislative act and supported by any form of taxation or licenses, fees, imposts, or exactions . . ." (§216.02(1), F. S., 1959.) And, as you are aware, the citrus commission in fact does report to the State Planning and Budget Commission pursuant to §216.02, F. S. In summary, I regret to inform you there appears no interpretation which would afford the outcome you desire.

068-31—March 6, 1968

**FLORIDA BOARD OF FORESTRY
COOPERATIVE AGREEMENT, WALTON COUNTY—
EMPLOYMENT OF COUNTY FORESTER**

To: C. H. Coulter, State Forester, Tallahassee

QUESTION:

May the following language be appropriately inserted in a cooperative agreement, drafted in pursuance of the authority granted in §§589.28-589.34, F. S.?

STATEMENT OF FACT—In pursuance of the above-stated question:

The county shall pay to the board from the general revenue funds of the county annually a sum equal in amount to 40% of the amount set up in the budget for expenditure during each fiscal period up to a maximum of \$3,000 per annum, *except that in the event the county is without services of a qualified forester, the \$3,000 maximum payment shall be reduced at the rate of \$250 per month for each full month such vacancy continues beyond a two month period.* The board shall pay into the fund the balance of the annual budget prepared and approved as aforesaid. (Emphasis supplied.)

The exception clause italicized above sets up a scheme other than that specified by the sections of the law mentioned. Therefore such is not permissible. The law authorizes the setting up of a budget for any fiscal period beginning July 1 and ending June 30, and the county's share of the budget is payable to the board of forestry in 2 parts, one half on or before July 1, and the remainder on or before Jan. 1.

Section 589.33, F. S., provides for a carry-over of any part of an appropriation deposited which is not used for any fiscal period, or that such may be returned to the Florida Board of Forestry and the county in the same proportions as appropriated. The specified provisions of the law are as much a part of any contract consummated in pursuance thereof as if set forth in any such agreement word for word.

068-32—March 6, 1968

**GAME AND FRESH WATER FISH COMMISSION
IMMUNITY OF COMMISSION AND EMPLOYEES FROM
LEGISLATIVE CONTROL AS TO EMPLOYMENT—
APPLICATION OF CH. 67-437 (CH. 110, F. S.)**

To: O. E. Frye, Jr., Director, Game and Fresh Water Fish Commission, Tallahassee

QUESTION:

Are the employees of the Game and Fresh Water Fish Commission subject to the provisions of Ch. 67-437, Laws of Florida, appearing in the statutes as Ch. 110, F. S., and relating to the powers and authority of the State Personnel Board?

You note that AGO 055-342, Biennial Report of the Attorney General 1955-1956, determined that by virtue of §30(5), Art. IV, State Const., the legislature could make no laws subjecting the employment, pay and discharge of employees of your commission to legislative enactment.

Although the opinion referred to dealt specifically with the question of whether these matters relating to your employees might by voluntary act be placed under the supervision of the then merit system, it is evident that indirectly the opinion determined that the constitutional status of your commission placed the employment, pay and discharge of your employees beyond the control of the legislature.

Section 30(5), Art. IV, State Const., states:

. . . The Commission shall appoint, fix the salary of, and at pleasure remove, a suitable person, as Director, and such Director shall have such powers and duties as may be prescribed by the Commission in pursuance of its duties under this section. Such Director shall, subject to the approval of the Commission, appoint, fix the salaries of, and at pleasure remove, assistants, and other employees who shall have such powers and duties as may be assigned to them by the Commission or the Director. . . .

Section 30(7), Art. IV State Const., then explicitly states: . . . "The Legislature may enact any laws in aid of, but not inconsistent with, the provisions of this amendment, . . ."

From the foregoing language of the constitution it is clear that the director of your commission, subject to commission approval, appoints, fixes the salaries of and at pleasure may remove assistants and other employees.

Your commission was established in 1942 by means of the above constitutional amendment, and the validity of the amendment has been recognized by our courts. *Sylvester v. Tindall*, Fla., 18 So.2d 892; *State v. Lee*, Fla., 41 So.2d 662; *Revels v. De Goyler*, Fla., 33 So.2d 719; *Griffin v. Sullivan*, Fla., 30 So.2d 919; *Prive v. St. Petersburg*, Fla., 29 So.2d 753; and other similar cases.

Apparently the reason for creating your commission through constitutional amendment was the statewide nature of its duties and the prior unsuccessful efforts of the legislature to deal adequately with the matter of fish and game preservation. *Sylvester v. Tindall*, Fla., 18 So.2d 892.

It is basic that the legislature may not exercise any lawmaking power that expressly or impliedly conflicts with the state constitution. *Miami Beach v. Crandon*, Fla., 35 So.2d 285.

Since §30(5), Art. IV, State Const., gives to the director of your commission, subject to its approval, the power to "... appoint, fix the salaries of, and at pleasure remove, assistants, and other employees, ..." it is evident that the legislature may not abridge this power by legislative act. Accordingly Ch. 67-437, Laws of Florida (Ch. 110, F. S.), is not effective as to your commission and its employees insofar as it conflicts with the above constitutional provision.

Although your commission and its employees are thus immune from legislative control as to employment, pay and discharge of such employees, it would appear the suggestions contained in AGO 055-342, Biennial Report of the Attorney General 1955-1956, that your employees might advisably be placed within the protective scope of the new career service system, have much to commend them.

If your employees are not placed under Ch. 67-437, Laws of Florida (Ch. 110, F. S.), your agency will apparently be the only branch of the executive department remaining on the old spoils system, which the legislature wished to abolish. I would recommend, accordingly, that you submit to your commission the advisability of voluntarily adopting the benefits and regulations of the career service.

068-33—March 6, 1968

TAXATION

HOMESTEAD EXEMPTION—CONSTRUCTION OF §192.141, F. S., AS AMENDED BY CH. 67-459, LAWS OF FLORIDA—SERVICEMEN

To: *William G. Zinkil, Tax Assessor, Broward County, Fort Lauderdale*

QUESTIONS:

1. Does §192.141, F. S., as amended by Ch. 67-459, Laws of Florida, pertain to a parcel of property purchased by, but never occupied by, a service person?

2. Is it necessary for the applicant to have previously been a resident of Florida and previously received homestead exemption?

Question 1 is answered in the negative. Question 2 is answered in the affirmative.

Section 192.141, F. S., as amended by Ch. 67-459, Laws of Florida, should be construed in light of §7, Art. X, State Const., and in light of cases dealing with the subject of abandonment.

In the case of *Poppell v. Padrick*, Fla., 117 So.2d 435 p. 437, it is stated:

Once the property has acquired the status of a homestead, this status would continue until an abandonment has occurred which being dependent upon the intent of the claimant, is a question of fact to be determined in each particular case. (Emphasis supplied.)

Both this case and the case of *L'Engle v. Forbes*, Fla., 81 So.2d 214, clearly contemplate that before the question of abandonment arises there must have previously been a homestead in existence. Also see

City of Jacksonville v. Bailey, 30 So.2d 529, which points out that continuous physical presence without interruption is not necessary to constitute a homestead for tax exemption purposes. This case also points out that temporary absence regardless of the reason therefor will not deprive a homestead of its homestead character, provided an abiding intention to return is always present. At p. 530 of said case it is stated: "It is always a question of fact in each particular case whether abandonment has actually occurred."

In the case of Judd v. Schooley, Fla., 158 So.2d 517, it is stated at p. 516: "All that is now required is that the property owner reside on the property and in good faith make 'the same his or her permanent home . . .'" In this same case, decided at the District Court level, found in 149 So.2d 587, at p. 590, it is stated: "The Supreme Court of Florida has defined the words 'good faith' as 'a concrete quality, descriptive of the motivating purpose of one's act or conduct when challenged or called in question.'" This definition of good faith should be definitely of benefit to all tax assessors when attempting to arrive at a decision in any given situation.

In AGO 068-1, I stated: "It should be construed as extending to all servicemen who had *previously claimed* a homestead exemption for tax purposes and been found to be entitled thereto under §7, Art. X, State Const., and the related laws found in Ch. 192, F. S." (Emphasis supplied.)

A member of the military service who had purchased a parcel of property, located in the state, but never occupied said property, would not be entitled to the homestead tax exemption in light of the provisions of §7, Art. X, State Const. This answers question 1. Since §192.141, F. S., clearly contemplates that there had previously been a homestead in existence, question 2 is answered in the affirmative.

I feel that the legislature has intended by the amendment to §192.141, F. S., to extend the advantages afforded to servicemen in the service as a result of a mandatory obligation imposed by the Federal Selective Service Act to individuals volunteering for service as members of the armed forces of the United States. It was intended to place all servicemen who answered the call of their country either voluntarily or involuntarily on an equal footing. For both of these categories of servicemen the rental of property previously impressed with the homestead status does not constitute an abandonment. If the serviceman vacated his home because of his being a member of the armed forces of the United States, whether such membership was on an involuntary or voluntary basis, and then rented the same, such rental would not constitute an abandonment. However, should a serviceman cease to consider the rented property his permanent home or cease to meet any of the requirements of §7, Art. X, State Const., the property would no longer retain its homestead status.

There may be situations where individuals had previously been receiving homestead tax exemption and then volunteered for service and rented that property which had previously been their homestead. Even though these servicemen had volunteered prior to the passing of Ch. 67-459, Laws of Florida, which amended §192.141, F. S., nevertheless the rental of the property is a result of their presence in the armed services. Such persons would be within the purview of the proviso found in §192.141, F. S. Therefore, such property would retain its homestead status for tax exemption purposes. Should the serviceman as a result of his presence in the service be unable to physically occupy the property on Jan. 1 of a given year, such fact would not defeat the

serviceman's claim for tax exemption for that year, so long as his claim was timely filed and so long as the other requirements of §7, Art. X, State Const., are met.

Insofar as the requirements for applications are concerned see §192.161, F. S. Each situation must be considered on the facts as presented by the particular applicant.

068-34—March 6, 1968

JUVENILE COURTS

ALLEGED JUVENILE DELINQUENT—FURNISHING OF LEGAL ASSISTANCE—INSOLVENCY OF CHILD, INSOLVENCY OF PARENTS

To: *Walter N. Colbath, Jr., Public Defender, Fifteenth Judicial Circuit, West Palm Beach*

QUESTIONS:

1. How far does a parent's legal obligation to support and maintain his child extend in proceedings in the juvenile court as the same touches upon providing said juvenile with legal assistance?

2. Must a juvenile's indigency or nonindigency be determined solely on the basis of his or her assets without reference to the assets of the parents?

3. If it is your opinion in question 2 above that parental assets may be taken into account, would this apply in cases where the parents themselves were the petitioners complaining of their own child's conduct?

4. If in question 2 above your opinion is that the parental assets may be taken into account, would this apply in those situations where parents do not want legal assistance for their child?

AS TO QUESTION 1:

Section 27.51(1), F. S., as amended in 1967 by Ch. 67-539, Laws of Florida, provides in pertinent part as follows:

... In any proceeding in a juvenile court in any county of this state having a population in excess of three hundred ninety thousand, according to the latest official decennial census, where a child is alleged to be a delinquent child pursuant to a petition filed therein *and the said child is determined to be insolvent*, and if such child requests, or the court on its own motion appoints, the public defender or assistant public defenders shall represent said child. In any proceeding in a juvenile court in any remaining county of this state where a child is alleged to be a delinquent child pursuant to a petition filed therein *and the said child is determined to be insolvent*, and if such child requests, and the court on its own motion appoints, the director of the division of youth services of this state shall appoint counsel to represent said child from the legal department of the division of youth services. If legal counsel is not available from the division of youth services, the juvenile court may appoint the public defender, assistant public defender or private counsel to represent the alleged delinquent indigent child. . . . (Emphasis supplied.)

The first sentence in the foregoing quotation provides that in any delinquency proceeding in a juvenile court of a county having a population in excess of 390,000, according to the latest official decennial census, where an allegedly delinquent child is determined to be insolvent, the public defender or assistant public defenders shall represent said child if he so requests. The child's entitlement to the assistance of the public defender or assistant public defenders, upon his request, is made contingent upon his own insolvency, not upon the insolvency of his parents.

Likewise, the operation of the provisions of the second sentence quoted above hinges upon the words "and the said child is determined to be insolvent." Hence, in applying said second sentence, it is the child's insolvency that counts, not his parents' insolvency.

The third sentence quoted above authorizes an alternate means of supplying counsel if counsel is not available under the second sentence. The third sentence has the same meaning as if it included the words "and the said child is determined to be insolvent," (which words are found in the second sentence). Consequently, the operation of the provisions of the third sentence depends upon the insolvency of the child rather than of his parents.

A somewhat analogous situation was before the Supreme Court of Florida in *Rastralli v. State*, 76 So.2d 270. That case involved the construction of §924.17, F. S., which provides the machinery whereby an appealing defendant in a criminal case may be adjudged insolvent for appeal purposes; if he is adjudged insolvent, the court costs incident to his appeal are paid from public funds. The trial court found that *Rastralli* himself was insolvent but refused to adjudge him insolvent within the contemplation of the statute because it had not been shown that his father was insolvent. The Supreme Court held that the trial court committed error and quashed its order, with directions that an order of insolvency be entered. In its opinion, the Supreme Court made the following observations:

... The trial court found from the affidavit and evidence that the defendant was insolvent, and yet denied his application because he had not shown that his father was unable to pay the costs of appeal. Such a finding must necessarily have been predicated on the conclusion that the payment of costs in a criminal case for the purposes of an appeal from a judgment of conviction is a "necessary," within the meaning of the law, for which the parent of an infant is liable in the same fashion that the parent is liable for food, clothing, shelter and other obvious necessities. We find no law to support such a conclusion.

As is made clear by our decisions, the test on an inquiry of insolvency is not what the prisoner's friends or relatives have the ability to do in paying costs, or their readiness or willingness to pay them. *The test is whether the defendant, himself, has the ability to pay the costs or to secure their payment.* *Swilley v. State*, 76 Fla. 173, 79 So. 715; *Baker v. State*, Fla., 42 So.2d 768; *Loy v. State*, Fla., 74 So.2d 650. (Emphasis supplied.)

These observations are equally applicable to the above-quoted provisions of §27.51(1), F. S. The result is that insofar as the furnishing of counsel for an insolvent, allegedly delinquent child is concerned, the parents' ability to provide such counsel is not the proper test, the true test being whether the child himself is insolvent.

In the case of *Re Gault*, 18 L. Ed.2d 592, the U. S. Sup. Ct. discussed an allegedly delinquent child's constitutional, as distinguished from statutory, rights with respect to counsel. The conclusions of the Court on this subject were stated as follows:

We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, *the child and his parent* must be notified of the child's right to be represented by counsel retained by them, or if *they* are unable to afford counsel, that counsel will be appointed to represent the child.

At the habeas corpus proceeding, Mrs. Gault testified that she knew that she could have appeared with counsel at the juvenile hearing. This knowledge is not a waiver of *the right to counsel which she and her juvenile son had*, as we have defined it. *They* had a right expressly to be advised that *they* might retain counsel and to be confronted with the need for specific consideration of whether *they* did or did not choose to waive the right. If *they* were unable to afford to employ counsel, *they* were entitled in view of the seriousness of the charge and the potential commitment, to appointed counsel, unless *they* chose waiver. Mrs. Gault's knowledge that she could employ counsel is not an "intentional relinquishment or abandonment" of a fully known right. (Emphasis supplied.)

On the surface, it would appear from what the United States Supreme Court thus said that an allegedly delinquent child's constitutional right to the appointment of counsel may depend upon both his inability and his parent's inability to afford counsel. The high court made no mention of what should be done with respect to the appointment of counsel in the event that the parents could afford to employ counsel to represent their child but failed to do so. However, the Court's great concern with respect to counsel was for the safeguarding of the rights and interests of the juvenile, not those of his parents, and I apprehend that it would unhesitatingly rule that a juvenile court must appoint counsel for an insolvent, allegedly delinquent child even if his parents had ample funds with which to employ counsel, unless the child and at least one of his parents intelligently waived the right to counsel. Therefore, upon consideration of the basic thrust of the *Gault* decision, I think that the safe course to follow would be to appoint counsel for an insolvent, allegedly delinquent child when the parents are able to provide counsel but fail to do so, unless there is an intelligent waiver by the child and at least one of his parents.

I realize that it is not fair to the taxpaying public to tap the public treasury for funds with which to pay counsel for a child whose parents are able to employ such counsel but fail to do so for one reason or another. Therefore, in the absence of an intelligent waiver of counsel, a juvenile judge will probably wish to discuss with the allegedly delinquent child's parents the question of whether they are able to employ counsel and, if it develops that they are, to endeavor to interest them to the extent that they will do so.

AS TO QUESTION 2:

In the light of the foregoing comments, I think that a juvenile's insolvency must be determined solely on the basis of his assets without reference to the assets of his parents.

AS TO QUESTIONS 3 AND 4:

Questions 3 and 4, as stated by you, do not require answers because I have not expressed the opinion that parental assets may be considered in determining the insolvency of a juvenile.

068-35—March 11, 1968

STATE OFFICERS AND EMPLOYEES

COMPULSORY RETIREMENT POLICY, STATE ROAD
DEPARTMENT—OVERALL STATE POLICY

To: *Jay McGlon, Director, State Personnel Board, Tallahassee*

QUESTION:

Is there any conflict between the policy of the state road department and the overall policy of the state relative to compulsory retirement of state employees?

You advise that the current policy of the state road department is formulated in a memorandum dated Nov. 30, 1967, a copy of which you attached to your letter.

Part 1 of the memorandum refers to events which were to have taken place no later than Jan. 1, 1968. These included retirement on that date of all employees 65 or older who were eligible for retirement; termination of all employees 65 or older who were without permanent appointment status; and termination or retirement of all employees 70 or older.

Part 2 of the memorandum sets policy subsequent to Jan. 1, 1968. Employees entitled to retirement shall be retired at the end of the month in which they reach 65; employees reaching 65 without entitlement to retirement may be transferred to less arduous duties; and employees reaching 70 will be terminated.

I have compared the above provisions with those of §112.051, F. S., and I find no inconsistency. The statute provides for compulsory retirement of employees at 65 who are entitled to retirement under any state plan. It permits an agency in its discretion to continue an employee beyond 65 to 70, with automatic retirement or separation at the latter age unless the employee and the agency agree to a further continuation. There is also provision for transferring an employee reaching 65 to less arduous duties. The legislative intent behind §112.051, F. S., appears to be as follows:

1. Employees under the merit or career service system shall be retired at 65 if entitled to retirement under any state retirement plan.

2. An employee reaching 65, whether entitled to retirement or not under some state plan, may at the discretion of the agency be continued in his employment to 70, at which time, whether entitled to retirement or not under some state plan, he may be separated (or retired if eligible).

3. An employee may continue beyond 70 if he requests the same in writing within the stated time and the agency consents.

4. Any employee reaching 65 who is continued in his employment may be shifted to less arduous duties without a right of appeal.

I find nothing in the state road department policy of compulsory retirement which is contrary to the above. Termination of employees reaching 65 who did not then have permanent appointment status on Jan. 1, 1968, appears to be in harmony with the rules and regulations

of the state personnel board. I am not aware of any conflict between the state road department policy on this subject and any other statutory provision relating to compulsory retirement.

068-36—March 11, 1968

**COUNTY ORGANIZATION, OFFICERS, REGULATIONS
AMBULANCE SERVICE—VOLUNTEER WORKERS,
EMPLOYMENT—LIABILITY OF COUNTY**

To: *Miller Lang, Gilchrist County Attorney, Trenton*

QUESTIONS:

1. If the county purchases an ambulance, could it then allow volunteer (unpaid) workers to furnish the ambulance service with this county equipment?

2. If the answer to the above question is in the affirmative, would these volunteer workers be considered "employees of the county"?

3. What, if any, liability would be incurred by the county and by the "volunteers," in the event of an accident with the ambulance, or by negligence of the volunteers?

With respect to question 1, it is apparent from the provisions of Ch. 67-26, Laws of Florida, (§125.441, F. S.) that a county could purchase an ambulance and then allow volunteer unpaid workers to furnish ambulance service with this equipment.

With respect to question 2, the volunteer workers could not be considered as employees of the county unless there was some form of employer-employee relationship established and the word "volunteers" would connote that their position would not be employees of the county. The question on its face would suggest that the county intends to use any unpaid "volunteers" that the county would be capable of recruiting for the purpose of providing ambulance service, and I would caution against the use of any personnel who are not qualified drivers or attendants within the meaning of §877.07, F. S., which provides, in part, that it shall be unlawful for any person to operate an ambulance in this state unless the driver or the attendant has successfully completed a course in first aid given by the American Red Cross, the U. S. Bureau of Mines, or an equivalent thereof which is approved by the board of health.

With respect to question 3, ordinarily, liability would not be incurred by the county since the provisions of §22, Art. III, State Const., providing immunity to suit to the state also provides immunity to political subdivisions of the state. *Kaulikas v. Boyd* (1962), 131 So.2d 505. It is my opinion, however, that the immunity to tort liability as provided by §22, Art. III, State Const., might not apply in this instance. Chapter 67-26, Laws of Florida (§125.441, F. S.), authorizes the board of county commissioners, *inter alia*, to do the following:

"(2) (a) . . . To operate and maintain county ambulance services . . . ;

(e) To establish, charge and collect reasonable fees for ambulance services rendered pursuant to this act.

(f) To render ambulance service to indigent persons."

In view of the foregoing authorizations, if a county should under-

take to provide ambulance services and to establish, charge and collect reasonable fees for ambulance services to those persons capable of paying for same, and to render ambulance services to indigent persons, such a function by any county would not be purely "governmental" in character, but in the nature of a "proprietary" or private business because of the establishing, charging and collecting of reasonable ambulance service fees to those persons capable of paying for same. Historically, ambulance service in this country has been provided by private enterprise and the entry of government into ambulance service is a relatively new aspect in Florida government. In *Suwannee County Hospital Corporation v. Golden* (Fla. 1952), 56 So.2d 911, the Sup. Ct. of Fla., in dealing with this matter, made the following observation, at p. 913:

... An enterprise is not governmental in character simply because the government enters it or the Legislature declares it so, but whether it is governmental or proprietary depends on the nature of its business and the court's determination. . . . We can only wonder when the entry of government into businesses as well and as readily operatable by individuals will cease. If the government undertakes to enter other fields such as amusement, entertainment, transportation, and communication, as is the present trend, on a basis that makes the competition one-sided because of the taxation feature, should the situation be made more unfair by declaring that inasmuch as the government is involved, no redress should be secured to one injured by negligence in the operation?

The church and the school are eliminated from consideration because the education of children is especially bidden in the constitution, while preference and aid to any church is expressly forbidden.

We are sympathetic with the view of the Supreme Court of Idaho expressed in *Henderson v. Twin Falls County*, 56 Idaho 124, 50 P.2d 597, 101 A.L.R. 1151, that in administering to pay patients a public hospital was not engaged in a governmental function, but in a proprietary or private business, there being a duty to care for the indigent, but none to care for those able to pay. Such an enunciation seems not unharmonious with what we said in *City of Miami v. Oates*, 152 Fla. 21, 10 So.2d 721.

The foregoing principle was followed in *Butts v. County of Dade* (DCA 2d Dist. 1965), 178 So.2d 592, wherein the court held that sovereign immunity from liability did not bar recovery of damages from the county by a bus passenger who claimed she was injured when the county's bus collided with another vehicle (a situation more closely parallel to the questions presented by you).

In view of the foregoing, it is my opinion that the county might not be covered by sovereign immunity to suit under the provisions of §22, Art. III, State Const., if the county intends to engage in providing ambulance services rendering free service to indigent persons but charging a fee for ambulance services to those persons who are capable of paying same. A county under these circumstances should secure sufficient liability insurance to cover the contingencies raised in question 3.

Another aspect of liability which is not of specific inquiry by you is with respect to a situation where a volunteer would be injured while

driving an ambulance in his voluntary capacity for the county. If the volunteer is injured, he would not be covered by workmen's compensation benefits within the meaning of Ch. 440, F. S., since the volunteer would have no contractual relationship with the county and would not be able to establish an employer-employee relationship to recover workmen's compensation benefits under the county's workmen's compensation coverage. (See *Leon County v. Sauls*, (1942) 8 So.2d 461, 142 A.L.R. 663.) The reasoning in the *Sauls* case, *supra*, appears possibly to have been modified in *Wolf v. City of Altamonte Springs* (1962), 148 So.2d 13, and even more recently in *Borden v. Florida Highway Patrol, Workmen's Compensation Claim File No. FF 56946* (1965), *cert. denied* 200 So.2d 532 (Fla. 1967). In *Wolf v. City of Altamonte Springs, supra*, the Supreme Court of Florida held a volunteer city firemen's organization which received a nominal fee from the city was an employee of the city. This entitled the firemen who belonged to the organization to reimbursement for medical and remedial treatment for injuries caused by an accident occurring within the scope of his employment.

In view of the foregoing, although not solicited, it is my suggestion that if the county proposes to secure the services of a volunteer worker to furnish the ambulance service with its county equipment, it would be best for the county to establish a contractual employer-employee relationship with such volunteer and pay each volunteer a nominal sum for the services performed by him. This action, in view of the above-cited workmen's compensation decisions, should, in my opinion, bring the volunteer within the scope of the workmen's compensation law and afford the employee workmen's compensation coverage for medical and remedial treatment for injuries caused by an accident occurring within the scope of his employment.

068-37—March 12, 1968

COUNTY OFFICERS AND EMPLOYEES

INVESTIGATORY POWERS OF INDIVIDUAL MEMBERS OF DUVAL COUNTY CIVIL SERVICE BOARD— CH. 22263, LAWS OF FLORIDA, 1943

To: *Roger West, Commissioner, Duval County Civil Service Board,
Jacksonville*

QUESTION:

What investigative powers does an individual member of the Duval County Civil Service Board have when acting in his official capacity, but not for the Board nor at the Board's direction?

Section 1, Ch. 22263, Laws of Florida, 1943, created the Civil Service Board of Duval County and provided for the membership thereof. Section 4 of the law states:

... The Civil Service Board as a body shall have the power [among other powers] ...

(b) To make investigation concerning the enforcement of this Act, and to require observance of its provisions and the rules and regulations made thereunder. (Emphasis supplied.)

The law clearly empowers the Board "as a body" i.e., in its corporate capacity. Individual members are not so empowered. The law is, by its own terminology, dispositive of the matter.

068-38—March 12, 1968

CONSOLIDATED CITY OF JACKSONVILLE

CONVEYANCE OF PROPERTIES TO SAID CITY AND TO
JACKSONVILLE ELECTRIC AUTHORITY BY FORMER
GOVERNMENTS*To: Hans G. Tanzler, Jr., Mayor-Commissioner, Jacksonville*

QUESTION:

Does section 6 of Ch. 67-1569, Laws of Florida, which requires the new City of Jacksonville on Oct. 1, 1968, to transfer to the Jacksonville Electric Authority all physical properties, assets, etc. ("relating to the electric system in existence on the date of the transfer"), require the various former governments . . . [to] convey, by deed or otherwise, their various properties to the consolidated government of the City of Jacksonville and to the Jacksonville Electric Authority?

The Charter of the Consolidated Government of the City of Jacksonville provides in §1.01, Art. 1, Ch. 67-1320, Laws of Florida, that the "consolidated government shall, without other transfer, succeed to and possess all the properties (of whatever nature) rights, capacities, privileges, powers, franchises and immunities . . . of the former governments. . . ."

These "former governments" are, as stated by §1.01, Art. 1 of the Charter:

The county government of Duval County, the city of Jacksonville, the city of Jacksonville Beach, the city of Atlantic Beach, the city of Neptune Beach and the town of Baldwin, the Duval County air improvement authority, the east Duval County mosquito control district, and the northeast Duval County mosquito control district . . .

In addition to the new government's succession to and possession of the former governments' properties by virtue of §1.01, Art. 1 of the Charter, the State Const. provides in §9, Art. VIII, that: "All property of Duval County and of the municipalities in said county shall vest in such municipal corporation [the consolidated government] when established as herein provided."

But the ownership "without other transfer" which §9, Art. VIII, State Const. and §1.01, Art. 1, Jax Charter "vests" in the consolidated government of the City of Jacksonville is not the subject matter of Ch. 67-1569, Laws of Florida. Section 1 of Ch. 67-1569 creates the Jacksonville Electric Authority, to which, according to §6, the "city of Jacksonville shall transfer" as of Oct. 1, 1968, the properties and assets in point. This is a conveyance of property from the new City of Jacksonville to a newly created authority. It is not exempted from the provisions of Ch. 689, F. S., and other relevant law as is the consolidated government's succession as aforementioned.

068-39—March 13, 1968

SHERIFFS

LIABILITY OF THE SHERIFF AND/OR COUNTY IN CONNECTION WITH AUXILIARY DEPUTY SHERIFFS

To: John A. Madigan, Jr., Florida Sheriffs Association, Tallahassee

QUESTIONS:

1. If an auxiliary deputy is called out by a sheriff or one of his commanding officers to assist the department, who is liable, and to what extent, should the auxiliary deputy be killed or injured? Does this liability extend to funeral expenses and care of the widow and children?

2. If an auxiliary deputy should be injured or killed while riding with a regular deputy sheriff in a patrol car, what is the extent of the sheriff's liability?

3. By virtue of Ch. 30, F. S., the sheriff may designate persons to help quell riots, etc., but who is liable, and to what extent, should this citizen be injured or killed?

4. Is the sheriff liable for the actions of men who accept pay for jobs as watchmen or guards while not on duty with the department but while wearing their auxiliary deputy uniforms identifying them as auxiliary deputies of the Sheriff's Department while performing their jobs?

This discussion should be prefaced by a brief characterization of an auxiliary deputy sheriff. A great majority of the sheriffs' departments in Florida have the benefit and assistance of men from the county who act as auxiliary deputies during times of need, emergencies and special holidays and weekends. They wear deputy uniforms, a badge, a gun, and ride with a regular deputy in a sheriff's department vehicle. These auxiliary deputies receive no compensation for the time and services rendered, but perform this duty as a civic responsibility. These deputies are acting under color of authority and are there to assist the sheriff in any way possible.

AS TO QUESTION 1:

In *Leon County v. Sauls*, 142 A.L.R. 663, 9 So.2d 461 (Fla. 1942), the Supreme Court of Florida held that a citizen called upon by a constable to assist in an arrest and who was subsequently killed was not covered by workmen's compensation. The Court further discussed the matter of compensation and contractual relationships contemplated by the workmen's compensation statutes, and concluded that the decedent had no contractual relationship with the county and was merely performing a request that any citizen might be called upon to perform for which no official status or compensation was provided under the statutes.

The reasoning in the *Sauls* case, *supra*, appears possibly to have been modified in *Wolf v. City of Altamonte Springs*, 148 So.2d 13 (Fla. 1962), and even more recently in *Bender v. Florida Highway Patrol*, Workmen's Compensation Claim File No. FF 56946 (1965), *cert. denied* 200 So.2d 532 (Fla. 1967).

In *Wolf v. Altamonte Springs*, *supra*, the Supreme Court of Florida held a volunteer city firemen's organization, which received a nominal fee from the city, was an employee of the city. This entitled the fireman who belonged to the organization to reimbursement for

medical and remedial treatment for injuries caused by an accident occurring within the scope of his employment.

The deputy commissioner in the Bender case, *supra*, denied workmen's compensation benefits to the wife of a deceased auxiliary highway patrolman who was instantaneously killed while performing his duties. The basis for this ruling was the fact that the patrolman, working for no compensation, had no average weekly wage upon which to base his claim under §§440.14 and 440.15, F. S. It is important, however, to note that the workmen's compensation insurance carrier stipulated liability as to medical and burial expenses in this case. See also 99 C.J.S. 413, Workmen's Compensation §117; 99 C.J.S. 230, Workmen's Compensation §43; 99 C.J.S. 275, 276, Workmen's Compensation §64.

It does not appear that the sheriff bears any liability in this area. If liability for medical and/or burial expenses does in fact exist in the instance of an injured or killed auxiliary deputy, the likelihood is that it will be covered under the county's workmen's compensation insurance, since the county is the insurer of a regular deputy. See *Parker v. Hill*, 72 So.2d 820 (Fla. 1954); AGO 055-303, Biennial Report of the Attorney General 1955-1956, p. 394. My research has uncovered no authority for allowing care to widows and children.

AS TO QUESTION 2:

The above discussion also relates to question 2 concerning the injury or death of an auxiliary deputy when riding with a regular deputy sheriff in a patrol car. The only possible extension of liability appears to be to the sheriff or county via the Dangerous Instrumentality Doctrine, or to the regular deputy through his gross negligence, or willful and wanton misconduct. See §320.59, F. S. However, such liability seems unlikely.

AS TO QUESTION 3:

Question 3 was contemplated in *Leon County v. Sauls*, *supra*, which is the last word from a Florida court regarding the sheriff's and/or county's liability for the injury or death of a citizen impressed into duty in public emergencies under Ch. 30, F. S. Although Sauls denied any recovery to the deceased's widow, there is authority from other jurisdictions allowing workmen's compensation benefits. *Eaton v. Bernalillo County*, 128 P.2d 738 (N. M. 1942); *Mitchell v. Industrial Commission*, 13 N.E.2d 736 (Ohio 1936); *Vilas County v. Monk*, 228 N. W. 591 (Wis. 1930). See also 99 C.J.S. 412. In Florida neither the county nor sheriff appears to be liable for death benefits or workmen's compensation to the injured citizen acting as an auxiliary deputy, although the county might be liable for medical and/or funeral expenses. See *Bender v. Florida Highway Patrol*, *supra*.

AS TO QUESTION 4:

Attention is focused now upon the sheriff's liability for actions of certain men who perform duties under color of authority of his office. In *Malone v. Howell*, 140 Fla. 693, 192 So. 224 (1939), the Supreme Court held the acts of a "de facto" deputy, which is one that has been held out to be a deputy and has so acted in the past, are considered the acts of the sheriff, and he is liable therefor under circumstances which make a sheriff liable for a "de jure" deputy. The Court further stated a sheriff is liable for those acts of his deputy that involve abuse of power reposed in him, but not those involving an usurpation of power, absent a statute to the contrary. See also, *Waters v. Dade Co.*, 169 So.2d 505 (3rd D.C.A. Fla. 1964). Based upon the above authority, it seems that a sheriff can be liable for the actions of men performing duties under the color of authority of his office.

068-40—March 13, 1968

COUNTY BOARDS OF PUBLIC INSTRUCTION
MEETINGS—PROCEDURE FOR RECONSIDERATION OF
PRIOR ACTIONS

*To: Floyd T. Christian, State Superintendent of Public Instruction,
Tallahassee*

STATEMENT OF FACT:

At a regular meeting of the Leon County School Board held on Feb. 27, 1968, a motion was duly made, seconded and unanimously adopted that a resolution be adopted by the Leon County Board of Public Instruction finding that certain members of the instructional staff in the Leon County school system had violated the terms of their contracts or agreements by leaving their positions without first being released from such contracts or agreements by the board.

QUESTION:

May the Leon County School Board at its next regular meeting following the meeting at which such motion was adopted reconsider its prior action?

Under the accepted rules of parliamentary procedure a member of a deliberative body who voted on the prevailing side of a question may move to reconsider the question affected by such vote. Inasmuch as the foregoing motion was unanimously carried by the Leon County School Board, it would be appropriate for any member desiring to do so to make a motion to reconsider the vote by which the motion passed. It is permissible for such motion to be made at the next regular meeting following the meeting at which the question was originally considered. If the motion to reconsider prevails the original motion will again be before the deliberative body for such disposition as that body wishes to make of such motion.

Under normal parliamentary proceedings possible action to be taken after a favorable vote on a motion to reconsider would include amendment of the original motion, the introduction, passage or defeat of a substitute motion, or, if a substitute motion is not adopted, the passage or defeat of the original motion as it may or may not have been amended. Your question is answered in the affirmative.

068-41—March 13, 1968

INSTRUCTIONAL PERSONNEL
CONTINUING CONTRACT—STATUS THEREOF AFTER
ACCEPTANCE OF RESIGNATION

*To: Floyd T. Christian, State Superintendent of Public Instruction,
Tallahassee*

QUESTION:

If a member of the instructional staff of the county school system, serving under a continuing contract, submits his resignation to the board of public instruction of his county and said board accepts such resignation, may that board subsequently reemploy such person on a continuing contract basis?

Section 231.36(3)(d), F. S., was enacted as a part of Ch. 67-387, Laws of Florida, which became effective July 1, 1967. That law, after stating the requirements to be fulfilled by members of the instructional staff in order to qualify for a continuing contract, contains the following language:

. . . [P]rovided, however, that a county board may issue a continuing contract to a member of the instructional staff after two (2) years employment in the county provided such individual has previously held a continuing contract in a county within this state. . . .

Under the provisions quoted above any person who has held a continuing contract in any county within the state may receive a continuing contract in any county in which that person has taught for a period of 2 years. This assumes that such person meets the other requirements for continuing contract set forth in §231.36(3)(a), F. S., to wit: that the person holds a regular certificate based on at least graduation from a standard 4-year college, or as otherwise provided by law; and that such person has been recommended by the county superintendent for such continuing contract based on successful performance of duties and demonstration of professional competence. Your question is answered in the affirmative.

068-42—March 25, 1968

INSURANCE

PRORATION OF TAX CREDITS UNDER §624.0312, F. S.

To: *Broward Williams, State Treasurer and Insurance Commissioner, Tallahassee*

QUESTION:

Where an insurer first establishes a regional home office in this state and such regional home office is established after August 1 but before December 31 of the year, may the insurer be allowed the tax credits provided for in §624.0312, F. S., on a pro rata basis?

Section 624.0312(3), F. S., provides that as to the calendar year in which a foreign insurer establishes a regional home office in Florida, if such establishment occurred on or before August 1 and the office was substantially occupied and maintained during the remainder of the initial year, the insurer is entitled to the credits and deductions of this section as though it had owned and substantially occupied such office during the entire calendar year. Thus the insurer in your question is not entitled to these credits for the full calendar year of establishment since such event occurred after August 1.

It would be my further view that such insurer would not be entitled to premium tax credits on a pro rata basis relative to the remainder of the year where such regional home office was established subsequent to August 1. My reason for this conclusion is that the legislature has dealt with the matter specifically and with particularity, thus eliminating the possibility of a more liberal interpretation of the statute than that expressed by the lawmakers. Under the principle of *expressio unius est exclusio alterius* I would deem that the statute sets out with precision the extent to which these credits will be allowable, and hence I

would have no authority by interpretation to engraft on the statute a further benefit.

068-43—March 29, 1968

STATE PERSONNEL BOARD

STATE EMPLOYEES—EXEMPTIONS UNDER CH. 110, F. S., LIMITATIONS

To: Jay McGlon, Director, State Personnel Board, Tallahassee

QUESTIONS:

1. May the state personnel board exempt certain employees or groups of employees from one particular portion of Ch. 110, F. S., such as §110.061?

2. If not, may the board exempt all employees of an agency from the scope of Ch. 110, F. S., particularly those of the bureau of law enforcement?

The evident intent of Ch. 67-437, Laws of Florida, which appears as Ch. 110, F. S., is to create a statewide personnel program based on merit and fitness. This statement is found in the title of the act itself. Accordingly the classified service in principle was designed to embrace all those who work for the state.

Nevertheless the legislature realized that it was in fact not feasible or beneficial to the state to make absolute the placement of all positions of employment under the career service system, and accordingly in §110.051, F. S., provision was made for exemptions from the classified service.

It appears, however, that exemptions from the career service system were intended to be kept at a minimum. For example, as to cabinet officers it is only policy-making employees and their secretaries who are excluded from the scope of Ch. 67-437, Laws of Florida, when specifically so designated by the official in question. A similar provision applies to the governor's office, except for the absence of a requirement of specific designation. Even as to these high officials of the state, salaries of their exempt employees are still set by the personnel board unless otherwise fixed by law.

Some additional latitude as to exemptions other than those stated in the statute is found in §110.051(2)(j), F. S., which relates to: "Any other position specifically exempted by the personnel board or by law; provided that such exemptions shall be reported to the legislature at least thirty days prior to each regular session."

It is my opinion, and I so advise, that this provision is intended to permit the personnel board for serious reasons to exempt further specific positions, but that such authority is to be used sparingly and only where the board finds that it would be detrimental to the state to have certain individual positions governed by the career service system. I find in this language no general delegation of discretion to the board to exempt entire agencies from the career law.

The requirement that such extraordinary exemptions be reported promptly to the legislature before each session convinces me that exemptions beyond those specifically provided for by the law itself were to be granted sparingly and only for grave reasons and only as to particular positions.

It would be my view, further, that the act makes no reference to

and was not intended to permit exemption of the employees of certain agencies from parts of the law, such as the provisions dealing with suspensions, discharges, reductions, demotions, layoffs, and transfers. The personnel board, accordingly, would have no authority without further legislative consent to apply the law piecemeal to state employees or engage in widespread establishment of further exempt positions. Questions 1 and 2 require a negative answer.

068-44—March 29, 1968

CITRUS CODE

POWER OF CITRUS COMMISSION TO AUTHORIZE ITS GENERAL MANAGER TO EXECUTE CONTRACTS

To: William P. Tomasello, Attorney, Florida Citrus Commission, Bartow

QUESTION:

After the Florida Citrus Commission has authorized a specific program and budgeted specific funds therefor, may the commission authorize its general manager to execute contracts in furtherance of the specific program in line with its administrative duties?

Section 27, Art. III, State Const., seems to contemplate that essential state and county governmental powers and authority be exercised by duly commissioned officers (Florida Dry Cleaning and Laundry Board v. Economy Cash & Carry Cleaners, 143 Fla. 859, 197 So. 550; State v. Lee, 150 Fla. 35, 7 So.2d 110; Dade County v. State, 95 Fla. 463, 116 So. 72; City of Miami Beach v. State, 95 Fla. 697, 116 So. 480). It was stated in *Blitch v. Buchanan*, 100 Fla. 1202, 131 So. 151, that, in view of §27, Art. III, State Const., governmental functions requiring independent judgment, discretion and authority can in general legally be exercised only by officers who are elected by the people or appointed by the governor, unless otherwise permitted by the Constitution.

It was also stated in *Blitch v. Buchanan*, *supra*, that §27, Art. III, State Const., does not prevent a statute from requiring public ministerial duties, not involving the exercise of official judgment or authority, to be performed by persons who are engaged in public service, though not officials, when some other provision of the Constitution is not thereby violated. It is stated in *Blitch v. Buchanan*, 131 So. 151:

Many functions that are not among "the powers of government" which are by the Constitution divided into three departments, and that do not involve *independent official judgment, discretion and authority*, may be performed under *statutory* authority by persons who are not elected or appointed to fill offices, when such functions may be so performed under the command or direction of officers who are elected by the people or appointed by the Governor. (Emphasis supplied.)

It appears from *Dade County v. State*, 95 Fla. 465, 116 So. 72, and *City of Miami Beach v. State*, 95 Fla. 697, 116 So. 480, that essential governmental functions, as well as essential governmental power or authority are required to be performed by and through commissioned officers.

In Advisory Opinion to the Governor, Fla., 63 So.2d 321, the Justices of the Supreme Court of Florida held that the hotel and restaurant commissioner then existing was not an officer as required under §27, Art. III, State Const., but an employee of the state, and

could not exercise the duties then imposed on the said commissioner, said duties being governmental in nature and within said §27, Art. III, State Const. In *Blitch v. Buchanan*, 100 Fla. 1202, 131 So. 151, the court found that the duties and obligations of a state executioner were not those of an officer within §27, Art. III, State Const., and may be performed by a person who was not an officer. In *McSween v. State Livestock Sanitary Board*, 97 Fla. 749, 122 So. 239, the status of the state veterinarian as a state official was questioned, and the court held that by reason of the powers, duties and obligations imposed on the said state veterinarian by the Statutes of Florida he was required to exercise independent official judgment, discretion and authority and was, therefore, an official of the State of Florida within §27, Art. III, State Const.

The power of the state to contract is a legislative prerogative and no board or officer can contract for it without legislative authority. Such power must be exercised in manner and form as directed by the legislature. The authority and powers of particular state officers and agents are determined by law. *Wadsworth v. State* (Ala. 1932), 142 So. 529, 531. Although the state may delegate the power to contract to its boards and officers, the duty of doing the essential things necessary to the creation of a contract and acts which involve discretion cannot be delegated by the authorized agency of the state to another. AGO 068-6, Jan. 12, 1968.

The Florida Citrus Commission derives its authority from Ch. 601, F. S., §601.05 of which in terms confers upon or delegates to the citrus commission as a body corporate the power to contract and be contracted with.

If the question above-stated contemplates the exercise of any independent judgment, discretion or authority by its general manager, in connection with the closing of the transaction, the answer to the above question would appear to be in the negative. If the duties and functions of the general manager are performed under or are conferred upon him by statutory authority, and are purely public ministerial duties, functions and powers, involving no independent judgment, discretion or authority, then the answer might be otherwise. The fact that the statutes vest in the commission "all the powers of a body corporate for all purposes necessary for carrying out the provisions and requirements" vests in it merely the powers of a public corporation for the purpose of carrying out its statutory duties, functions and powers, and does not transform it into a general corporation. It operates and carries out its duties, functions and powers in a manner like or similar to that of a general corporation, but is not given the status of a corporation generally.

068-45—April 1, 1968

TAXATION

INSTALLMENT PAYMENT OF AD VALOREM TAXES AS PROVIDED BY §193.50, F. S.—APPLICATION TO MUNICIPAL TAX COLLECTIONS

To: *Fred O. Dickinson, Jr., State Comptroller, Tallahassee*

QUESTION:

Does Ch. 67-533, Laws of Florida, which amends §193.50, F. S., and which relates to installment payments of ad valorem taxes, apply to the several municipal tax collections?

As qualified below your question is answered in the negative. Chapter 67-533, Laws of Florida, relates to the installment payments of ad valorem taxes. Said law amends §193.50, F. S. Note that the amended §193.50, F. S., speaks in terms of tax collectors making a final report and final settlement with the county commissioners. In another place in said section settlement by the tax collector with the county authorities is mentioned. No reference is made in said section to municipalities or tax collectors of municipalities.

It has been the uniform practice of the legislature for many years to provide legislative charters for most, if not all, of the larger cities and towns of the state. When this is done said municipalities have separate complete municipal governments, separate and apart from the county and state government. Most of said charters provide separate and complete procedure for the valuation, assessment and taxation of the taxable properties within the municipal limits. The procedure may differ from the procedures provided for in Chs. 192, 193, and 194, F. S. (Also see §§167.43, 167.46, 193.61 and 193.62, F. S.)

In some counties there has been a consolidation of the county and municipal tax assessment and collection procedures. In this respect I refer you to §§12-22, Art. VIII, State Const., which covers the counties of Hillsborough, St. Lucie, Volusia, Broward and Pinellas, and counties having consolidated tax rolls by virtue of general, special or local acts of the legislature pursuant to §22, Art. VIII, State Const. Dade County has a consolidated tax procedure by virtue of §11(1)(b) and (d), Art. VIII, State Const.

Section 193.50, F. S., as amended by section 1, Ch. 67-533, Laws of Florida, would apply to those municipal corporations which have consolidated county and municipal tax assessment and collection. It would not apply to other municipalities, towns and cities throughout the State of Florida. This is in accord with §5, Art. IX, State Const., which states, where material:

... The Legislature shall authorize the several counties and incorporated cities or towns in the State to assess and impose taxes for county and municipal purposes, and for no other purposes, and all property shall be taxed upon the principles established for State taxation. *But the cities and incorporated towns shall make their own assessments for municipal purposes upon the property within their limits.* . . . (Emphasis supplied.)

For comparison might I refer you to House Bill 877 which failed and did not become a law. This bill sought to amend Ch. 193, F. S., by adding §193.411, F. S. In section 1, it provided: "Any person subject to ad valorem taxation shall have the election to pay such taxes on an installment basis subject to the provisions of this section. Such person shall make this election in writing to the tax collector of the *county and/or municipality*, . . ." (Emphasis supplied.) Note that Ch. 67-533, Laws of Florida, contains no reference to municipality, while House Bill 877 refers to municipalities.

Nothing herein should be construed to allow a municipality to deviate from the requirements of §1, Art. IX, State Const. Said constitutional provision was held applicable to the cities in the cases of *City of Naples v. Conboy*, Fla., 182 So.2d 412; and *State v. Atkisson*, Fla., 170 So.2d 455. Your letter makes reference to Ch. 67-396, Laws of Florida. This will be discussed in a separate letter.

068-46—April 1, 1968

MUNICIPAL TAXATION

ASSESSMENT OF REAL AND TANGIBLE PERSONAL
PROPERTY—POWER OF COMPTROLLER*To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee*

QUESTION:

What are the powers of the comptroller in connection with the withholding of state funds for failure of municipal tax officials to assess taxes pursuant to law?

Section 5, Ch. 67-396, Laws of Florida, (§167.445, F. S.), states as follows:

... The comptroller of the state of Florida is hereby directed to determine each year whether the several municipalities of this state are assessing the real and tangible personal property within their jurisdiction in accordance with law. If the comptroller determines that any municipality is assessing property at less than that prescribed by law, the comptroller shall withhold from such municipality a portion of any state funds to which that municipality may be entitled equal to the difference of the amount assessed and the amount required to be assessed by law.

This section requires the comptroller to determine whether or not municipal tax assessors throughout the state: "are assessing the real and tangible personal property within their jurisdiction in accordance with law." and, as to those municipalities assessing such properties at "less than that prescribed by law, the comptroller shall withhold from such municipality a portion of any state funds to which that municipality may be entitled *equal to the difference of the amount assessed and the amount required to be assessed by law.*" (Emphasis supplied.)

Section 1, Art. IX, State Const., requires that:

The Legislature shall provide for a uniform and equal rate of taxation, . . . and shall prescribe such regulations as shall *secure* a just valuation of all property, both real and *personal*, excepting such property as may be exempted by law for municipal, education, literary, scientific, religious or charitable purposes. (Emphasis supplied.)

To substantially the same effect, see also §16, Art. XVI, State Const., relating to corporate properties.

The Supreme Court of Florida has held that said constitutional provisions require that both real and tangible personal property (*Walter v. Schuler*, Fla., 176 So.2d 81) as well as intangible personal property (*Green v. Walter*, Fla., 161 So.2d 830), must be assessed on the basis of their fair market value for purposes of taxation, and that any assessment on the basis of less than fair market value of the property taxes will be an unlawful valuation and assessment in violation of said §1, Art. IX, and §16, Art. XVI, State Const. This rule of tax assessment and valuation was followed in the *City of Naples v. Conboy*, Fla., 182 So.2d 412; *State v. Atkinson*, Fla. App. 170 So.2d 455. These opinions of the Florida courts apply the same rule for the valuation and assessment of municipal taxes as has been applied to county taxes;

that is, a valuation of real or tangible personal property for municipal and county taxes is on the same basis—one hundred per cent of the just valuation thereof, which has been determined by the Supreme Court of Florida to be the fair market value of such properties.

Section 5, Art. IX, State Const., requires for the purpose of county and municipal ad valorem taxation: "... all property shall be taxed upon the principles established for State taxation. . . ." Although §5, Art. IX, State Const., requires in this connection: "... all property shall be taxed on the principles established for State taxation. . . ." this phrase, as used in the Constitution, refers to the organic requirements of uniform and equal rate of taxation and such statutory regulations as shall secure just (fair market value) valuation of all property. This requirement is applicable, notwithstanding the abolition of state taxation of real and tangible personal property by §2, Art. IX, State Const.

It follows from the above-mentioned constitutional provision, statutes, and cited cases, that the same rule of valuation of property for county taxation, as announced in *Walter v. Schuler, supra*; *Green v. Walter, supra*; *City of Naples v. Conboy, supra*, is applicable to municipal taxation and should be followed by municipal tax assessors and other assessing authorities assessing municipal taxes. If municipal tax assessing officers are assessing properties for municipal taxation on this basis (fair market value) then their assessments are "in accordance with law."

068-47—April 1, 1968

PURCHASING COMMISSION

SURPLUS PROPERTY, STATE-OWNED—REQUIREMENTS FOR DISPOSITION

To: *Al J. Day, Executive Director, State Purchasing Commission, Tallahassee*

QUESTION:

In connection with a disposal of surplus property under §273.07, F. S., does the executive director of the state purchasing commission have the authority to require custodians to furnish information as to the method of disposal, names of buyers and prices received from sales?

Chapter 287, F. S., setting out the duties and authority of the state purchasing commission, relates almost exclusively to matters relating to purchases by the state. Any authority your commission may have, accordingly, as to surplus property would have to be derived from Ch. 273, F. S., which deals particularly with the custody and disposal of state-owned tangible personal property.

When such property becomes surplus in the discretion of the custodian, he is required to certify such fact to your commission, and your commission in turn is required by §273.06, F. S., to offer such property for purchase by other state custodians.

It is evident that the availability of such surplus property might be relevant to the problem of determining the needs of other agencies, hence it would be at this point of interest to your commission in connection with its duty to encourage reasonable economies in the purchasing practices of the various state agencies.

However, when such surplus property is not usable by other custodians and is put up for sale to outsiders under §273.07, F. S., it would appear that your commission would have no jurisdiction over or further interest in its disposal, as being a matter apparently nowise related to state purchasing.

This conclusion is reinforced by the evident intent of §273.07, F. S., that disposition of surplus property to outsiders is to be carried out under the supervision of the custodian of such property. This seems apparent from the final language of this section, which provides for publication of notice of proposed sales "... in additional newspapers if the custodian thinks the best interests of the state will better be served ..."

Responsibility for proper disposal of surplus property under §273.07, F. S., therefore, appears to be vested in the custodian having lawful custody thereof rather than in your commission. Certain safeguards are provided by the statute to insure responsible handling of such disposal.

For example, the custodian is subject to a misdemeanor charge if he violates any provision of Ch. 273, F. S. He is also subject to the scrutiny of the state or legislative auditor. He must obtain approval of the state planning and budget commission as to items having an estimated value of \$5,000 or more.

It is my view, therefore, and I so advise, that you as executive director of the state purchasing commission would not be in a position to require that a custodian provide you with information relating to the method of disposal, names of buyers and prices received from sales. Disposal under §273.07, F. S., would not be sufficiently related to purchases as to come under your general powers as expressed in Ch. 287, F. S., or your limited participation in disposal as provided for by §§273.05 and 273.06, F. S.

I might add finally that although §287.061(3), F. S., invests your commission with all the powers of the state planning and budget commission relating to the purchase of certain items specified therein, I would not interpret this subsection to constitute a transfer of the function of the budget commission with reference to approval of sales of \$5,000 or more contained in §273.07, F. S. Disposal of surplus property to outsiders does not appear in any way to be related to purchases.

068-48—April 1, 1968

COUNTY SCHOOL BOARDS—PURCHASING COMPLIANCE WITH REGULATIONS OF STATE PURCHASING COMMISSION

To: *Al J. Day, Executive Director, State Purchasing Commission,
Tallahassee*

QUESTION:

Must county school boards, under the provisions of §230.23 (10)(j), F. S., comply with Purchasing Commission Regulation 300-1.08, adopted Dec. 19, 1967, either in providing the purchasing commission with data or in being required to comply with the various term contract or source of supply provisions executed by the commission?

Generally, county school boards have not been held to be agencies

of the state within the purview of Ch. 287, F. S. Similarly, even where county school boards elected under certain optional statutes to make use of contracts negotiated by the state, they have not been held to forego their exemption. See AGO 062-78, June 4, 1962, Biennial Report of the Attorney General, 1961-1962, p. 482.

Section 230.23(10) (j), F. S., does not modify either of the above rules. It requires a county school board only to: "... give consideration to, the lowest price available to it under such regulations, ..."

It is my opinion that §230.23(10) (j), F. S., neither empowers the state purchasing commission to require estimates of needs from county school boards nor requires county school boards to purchase only from sources certified by the state purchasing commission.

068-49—April 2, 1968

SUBMERGED LANDS

RIGHTS OF UPLAND RIPARIAN OWNERS— EASEMENTS OR DEDICATIONS

To: *F. Bradley Kennelly, Attorney, Jacksonville Port Authority, Jacksonville*

QUESTION:

May easements or dedication of submerged lands be obtained from the state by persons not upland riparian owners?

Sections 253.12(4) and 253.111(7), F. S., respectively, categorically limit sale of such lands to upland riparian owners, and preclude dedication of such lands to a county absent consent of the upland riparian owners. The "consent" indicated by §253.111(7), F. S., would necessarily entail the formal conveyance of an interest in real property.

Surely "out of the rivers of ink that have been written on this subject' certain fundamental principles have emerged," *Hayes v. Bowman, Fla.*, 91 So.2d 795, 798, including (1) the trust in which these sovereign lands are held and (2) the "recognition and protection" to be accorded the "rights of the upland owners." *Ibid.*

Protection of the property values of the upland riparian owners is among the preeminent norms of our law on this subject, as witnessed by §§253.12(4) and 253.111(7), F. S. It would appear, then, that the very lands which may not be sold or dedicated to the detriment of upland riparian owners may not be similarly burdened by such an incorporeal property interest as is an easement, *J. C. Vereen & Sons, v. Houser, Fla.*, 1936, 167 So. 45.

068-50—April 2, 1968

PURCHASING COMMISSION

PRINTING CONTRACTS—SPECIFICATION REQUIREMENTS

To: *Al J. Day, Executive Director, State Purchasing Commission, Tallahassee*

QUESTIONS:

1. May an agency of the state compile specifications unlimited as to page size, number of pages, quantity, ink colors, paper quality or type of binding, and applicable alike to compo-

sition, printing and binding of innumerable publications, leaflets and brochures, solicit competitive bids on such specifications and legally enter into an annual contract for their production with the lowest responsible bidder?

2. Does limitation to particular sizes and maximum quantities in any way affect legality of such a contract?

Agencies have a responsibility to draw bids with clarity and particularity so as to afford a reasonable basis for a comparison of bids. *Wester v. Belote*, 103 Fla. 976, 138 So. 721.

Also, a state agency must draw bid specifications which are reasonable in nature and intended to accomplish a valid agency need. To put it another way, bid specifications are acceptable so long as they are not composed in an arbitrary or capricious manner or designed for the purpose of eliminating competitive bidding. *Robbinson's Inc. v. Short*, 146 So.2d 108, *Mayes Printing Co. v. Flowers*, 154 So.2d 859.

By §283.10, F. S., the legislature clearly intended to distinguish between a "general" contract to handle printing from a given source such as an agency and a contract to print a particular "job" requested by said sources. A "general" printing contract is, of course, not permissible.

Although the term "job" printing contract within the meaning of this section has not specifically been defined by the courts, it is clear the legislature contemplated a specific piece or "job" of printing. In line with this intent, a printing job should be definite as to typeface, page size, inks and similar elements. A suggested test for validity under this section is, first, whether a specific "job" is contemplated and, secondly, whether the elements of the job are defined precisely enough to afford all printers in the state an equal opportunity to compete. It is my opinion that a particular printing job within the meaning of this section should be limited to each particular book, pamphlet or series of same. A prohibited general contract would be one that combines 2 or more books, pamphlets, etc. which are clearly separated and distinct as to format, subject matter, typeface and related matters. Obviously, in some hairline situations, the questions of whether one or more contracts would be required under §283.10, F. S., would depend on the facts of the particular case. As the Supreme Court of Florida noted in construing a somewhat different problem arising under this section:

... [T]he authorities on the subject are not in harmony, but may be said to justify a reasonable contention that forms specially gotten up and printed for particular uses should ordinarily be regarded as constituting a printing job. However, the question is by no means reduced to a simple question of law, wholly disconnected from its associated factual considerations, the ascertainment of which involves considerable difficulty. *State v. Lee*, (Fla. 1935) 163 So. 702, 703.

However, it is my opinion that an agency of the state may enter into a contract whereby the agency specifies the type booklet—or page—it requires, in accordance with the above-noted limitations, and then requests bids based on cost per certain volume of same, with the final volume to be determined on the basis of need at a later date. Examples of such contracts would be those let by the Attorney General to print all the briefs required during the course of a year, or the contract let by the Secretary of State for printing the official Administrative Code for a particular period of time.

068-51—April 4, 1968

CRIMES

INHALATION OR POSSESSION OF MODEL GLUE

To: *Marvin U. Mounts, Jr., County Solicitor, Palm Beach County, West Palm Beach*

QUESTION:

Does the prohibition of Ch. 67-416, Laws of Florida (§877.11, F. S.), apply only to glue or cement which contain solvents and toxic vapors?

Your question is answered in the affirmative. By the very language of section 1 (A), Ch. 67-416, Laws of Florida (§877.11(1), F. S.), the term "model glue" must be a type of glue or cement commonly used in the building of model airplanes, boats and automobiles which contains one or more volatile solvents listed in said chapter.

Your inquiry alludes to the closing language of said §877.11(1), F. S., which states: "... [O]r any other solvent, material, substance, chemical or combination thereof, having the property of releasing toxic vapors."

In reviewing the general rules of statutory construction applicable to section 1 (A) of Ch. 67-416, Laws of Florida (§877.11(1), F. S.), the doctrine of ejusdem generis (see 28 C.J.S. 1049) appears to be controlling. In its simplest terms, this doctrine is construed to mean that where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase is to be held to refer to things of the same kind.

Therefore, it is my opinion that the closing language of section 1 (A), Ch. 67-416, Laws of Florida (§877.11(1), F. S.), is not meant to create possible new categories in addition to glue or cement, but rather is designed to enlarge the list of volatile solvents and combinations thereof set forth in Ch. 67-416, Laws of Florida (§877.11, F. S.), which could be considered a type of glue or cement.

068-52—April 5, 1968

ELECTIVE STATE OFFICERS

QUALIFICATIONS OF PUBLIC SERVICE COMMISSIONER

To: *Ray C. Osborne, State Representative, St. Petersburg*

QUESTIONS:

1. Does a member of the public service commission have to reside in Tallahassee?
2. What persons cannot contribute to the campaign fund of a candidate for public service commission?
3. Can a member of the public service commission have any other employment; specifically can a member practice law?

AS TO QUESTION 1:

Section 350.04, F. S., outlined the qualifications for members of the public service commission, as follows:

... The commissioners provided for in this chapter shall not, jointly or severally, or in any way be holders of any rail-

road stock or bonds or any utility stock or bonds, or be the agent or employee of any railroad company or have any interest in any railroad company or be the agent or employee of any utility company or have any interest in any utility company during their respective terms of office.

The above-quoted statute is silent on the matter of residence for public service commission members. It is, however, common knowledge that the headquarters of the commission is situated in Tallahassee and presently all members of the commission regardless of their former residence have found it necessary to move to Tallahassee or Leon County in order to "faithfully perform the duties of Florida Public Service Commissioner" under the oath which they are required to take by §350.05, F. S. Thus it does appear that the functions and responsibilities of the position would in fact, if not in law, require a commissioner to spend a substantial amount of time at the commission headquarters in the Capital City so as to make residence in any other area of the state impractical. Question 1 is answered accordingly.

AS TO QUESTION 2:

The same persons may contribute to the campaign funds of candidates for the office of public service commission as may contribute to other political campaigns. In particular, your attention is directed to §§104.091 and 99.161(1)(a)-(c), F. S., which prohibit persons regulated by the public service commission as well as those holding licenses authorizing the sale of intoxicating beverages and permits authorizing dog and horse racing from contributing to political campaigns. Question 2 is answered by reference to these statutes.

AS TO QUESTION 3:

The requirements of §350.04, F. S., are silent on the matter of outside legal practice by attorney members of the public service commission. Again, as in the question of residence discussed above it would appear that the practicalities of the situation coupled with the apparent demands on the time of the present commissioners would preclude any outside practice of law. In addition the new Standards of Conduct Law found in Ch. 67-469, Laws of Florida, (§§112.311-112.319, F. S.) would prohibit a commissioner or his firm from representing or opposing persons over whom the commission has jurisdiction. This same Standards of Conduct Statute as discussed in AGO 067-12, Mar. 6 (this report) would require an attorney officer of a state agency to disclose to the Secretary of State any clients having substantial business commitments from a state agency and also clients subject to regulation by the state. Question 3 is answered accordingly.

068-53—April 8, 1968

TAXATION

SALES AND USE TAX—CONSTRUCTION OF §212.02(16), F. S., AS AMENDED BY CH. 68-27, LAWS OF FLORIDA, RELATIVE TO DUES TO PRIVATE CLUBS

To: *J. Ed Straughn, Director, State Revenue Commission, Tallahassee*
QUESTION:

What is the taxable status of dues paid to various clubs or organizations?

This question has arisen as a result of the amending of §212.02(16), F. S., by Ch. 68-27, Laws of Florida.

It is necessary to examine briefly the history of §212.02(16), F. S. The term "admissions" as therein defined originally made no reference to dues. Said section was amended by Ch. 63-526, Laws of Florida, and it is here that "dues" became a part of said definition. Therein the term "admissions" is defined as follows:

. . . The term "admissions" shall mean and include the net sum of money after deduction of any federal taxes for admitting a person or vehicle, or persons, to any place of amusement, sport or recreation, or where there is any show, game or exhibition and where any charge is made by way of sale of tickets, gate charges, seat charges, box charges, season pass charges, cover charges, greens fees, *all dues paid to private clubs providing recreational facilities, including but not limited to golf, tennis, swimming, yachting and boating facilities; but specifically excluding civic, fraternal and religious clubs and organizations, participation fees, entrance fees, or other fees.* (Emphasis supplied.)

The italicized portion of the previously quoted section was changed by section 3, Ch. 65-329, Laws of Florida, to read as follows:

. . . [A]ll dues paid to private clubs providing recreational facilities, including but not limited to golf, tennis, swimming, yachting and boating facilities; *but specifically excluding dues paid to civic, fraternal and religious clubs and organizations.* (The italicized wording above is that which was changed.)

Chapter 68-27, Laws of Florida, amended §212.02(16), F. S., by deleting the language ". . . but specifically excluding dues paid to civic, fraternal and religious clubs and organizations."

This means that all dues paid to private clubs including dues paid to civic, fraternal and religious clubs and organizations are now subject to the tax imposed on "admissions" by §212.04, F. S., but only in the event such clubs provide recreational facilities including but not limited to golf, tennis, swimming, yachting and boating.

The legislature has defined "admissions" and has included in said definition the word "dues." However, it has limited this to only those dues paid to private clubs providing recreational facilities including but not limited to golf, tennis, swimming, yachting and boating. Thus, if a private club provided no recreational facilities it would not be subject to the tax. Contrarily if a private club does provide recreational facilities including but not limited to golf, tennis, swimming, yachting and boating, it would be subject to the tax. Dues paid to civic, fraternal and religious clubs and organizations would be subject to the tax but only if such clubs provided recreational facilities including but not limited to golf, tennis, swimming, yachting and boating. Such clubs which provide no such recreational facilities would not be subject to the admissions tax.

The provisions of §212.04, F. S., and specifically §212.04(2)(b) and (c), F. S., have been examined. Said section does not contain an exemption for dues paid to civic, fraternal and religious clubs and organizations. Section 212.08, F. S., has also been examined. Nowhere is there an exemption provided for dues paid to civic, fraternal and religious clubs and organizations. Chapter 67-180, Laws of Florida, was also examined and nothing found therein alters the conclusion reached in this letter.

Section 14 of Ch. 68-27, Laws of Florida (§212.21(5), F. S.), has

been examined and provides: "It is the legislative intent that the repeal by this act of any provision heretofore exempting in whole or in part any item or transaction from the tax imposed by chapter 212, Florida Statutes, shall result in the full imposition of the applicable tax to any such item or transaction." (Emphasis supplied.) Note that this section refers to "... full imposition of the applicable tax. . . ." We must then look to determine what would be the applicable tax which would be imposed by the repeal of any provision which had previously provided an exemption.

Section 212.02(16), F. S., taxes dues in only one place. It imposes the tax on dues paid only to private clubs providing recreational facilities, including but not limited to golf, tennis, swimming, yachting and boating facilities. The term "admissions" makes no reference to any other dues. The legislature has apparently not seen fit to tax in total all dues paid to all private clubs regardless of whether or not said private clubs provide recreational facilities. Section 212.04, F. S., has only imposed the tax on admissions as defined in §212.02(16), F. S. Said section does not include a blanket imposition on all dues.

The act does not define what constitutes "providing recreational facilities." The definition of such would appear to be a proper subject for the rule-making power of the commission. In accomplishing this, general definitions found in dictionaries might well be appropriate. Case authority definitions might also be resorted to.

068-54—April 8, 1968

OCCUPATIONAL LICENSE TAXES

LICENSE REQUIRED BY CH. 205, F. S., FOR OPERATION OF FLEA MARKET OR STREET MARKET CONSISTING OF SEVERAL STALLS, FOR SALE OF SECONDHAND OR CHEAP MERCHANDISE

To: G. Troy Ray, Jr., Tax Collector, Seminole County, Sanford

STATEMENT OF FACTS:

An owner of property adjacent to highway #436 Seminole County, which is zoned "Commercial" next to a residential section, is renting space on a vacant lot to anyone who wishes to sell miscellaneous items (which were obtained from a utility room, attic, etc.) and in some cases new merchandise. There are many sites or "stalls" set up from which to sell, and they are open to anyone desiring to rent space.

QUESTION:

What license or licenses would be required under the above-stated facts?

You refer me to §§205.482, 205.531, 205.471, and 205.06, F. S. You also refer me to the case of *Jasper v. Knight*, 196 So.2d 235.

Chapter 205, F. S., was amended and revised by Ch. 67-433, Laws of Florida. Said Chapter 67-433, Laws of Florida, consolidated Chs. 205 and 204, F. S., which dealt with the subject of retail store license taxes.

Sections 205.471, 205.482, and 205.531, F. S., referred to in your letter, are sections found in Chapter 205, F. S., as amended, while §205.06, F. S., was in Ch. 205, F. S., prior to its amendment and revision.

First consider the *Jasper* case which you have asked that I analyze.

This is a March, 1967, case which arose under Ch. 205, F. S., prior to its amendment and revision by Ch. 67-433, Laws of Florida. In it the Court construed §§205.49, and 205.59, F. S. At p. 235 of said case, the Court stated:

Plaintiff operates exhibitions and showings of antiques throughout Pinellas County. As a result of the nature of his business, he holds these exhibitions in more than one location and leases spaces to antique dealers and charges the public for admission to the exhibitions.

Under this set of facts the collector had required the plaintiff to purchase individual licenses for each place of exhibition and had levied additional license taxes on each dealer leasing space from the plaintiff. The Court held that the plaintiff was only required to purchase one license, provided that he did not conduct 2 or more exhibitions simultaneously. This was the license required under §205.49, F. S. (Now §205.401, F. S.) The Court held that plaintiff's exhibitors: "... [M]ust each hold their exhibition *subject to the payment of license tax provided by §205.59, Fla. Stats., F.S.A.; . . .*" (Emphasis supplied.) Section 205.49, F. S. (now §205.401, F. S.), is the provision which provides for the licensing of businesses not otherwise covered. This is the license which was required of the plaintiff in the Jasper case.

Section 205.59, F. S. (now §205.531, F. S.), requires a license from "Every person engaged in the business of trading, bartering, serving, or selling tangible personal property, as owner, agent, broker, or otherwise, . . ." This was the license required of each exhibitor.

Section 205.482, F. S., must also be considered. This provision contains much of that which was formerly found in Ch. 204, F. S. Note that the license is required for each store. This is emphasized by former §204.02, F. S., which imposed the tax "... for each store located and operated within this state by such person. . ."

Chapter 204, F. S., had its origin in Ch. 16848, Laws of Florida, 1935. We look to the title as a guide to legislative intent. Said title provides in part:

AN ACT to Provide for the Relief of the Public Free Schools of the State of Florida by Raising Revenue for the County School Fund by Levying and Imposing a *Tax Upon the Privilege of Operating a Store or Stores Within this State*, . . . (Emphasis supplied.)

Note that this tax falls on the privilege of operating a store or stores. Thus where there is no operation of a store or stores, there would be no tax. (Also see section 4 of Ch. 16848, Laws of Florida, 1935.)

Section 205.482, F. S., seems to have continued this concept by making the basis for the license tax the number of stores located and operated within this state.

We must therefore determine if the spaces rented by the individuals from the vacant lot owner would be considered as stores and if the lot would be considered as a store.

Webster's New International Dictionary, 2nd Edition, 1960, defines "store" as follows: "... 8. Any place where goods are kept for sale, whether by wholesale or retail; a shop. . ." It also defines "shop" as follows: "1. An artisan's place of manufacture and sale; as, a bowyer's, plumber's, or potter's *shop*. 2. A building or an apartment in which goods, wares, drugs, etc., are sold by retail. . ." Although "store" is not defined in §205.482, F. S., it was defined in former

§204.01(6), F. S. It was construed in the case of *Lee v. Cloverleaf*, 177 So. 722, p. 723, as follows:

Considering the title and the definition of the word "store" as quoted and used in the act, it would be difficult to enunciate in clearer language that the tax brought in question *was limited to a store or stores of any mercantile establishment or establishments owned by the same person or corporation and selling at retail*. Such being the scope of the act, other terms defined therein, such as "person," "sale," "retail sale," "business," "retailer," "gross receipts," and "chain" or "chain stores" are limiting words relating only to the primary subject taxed.

We find nothing in the title or body of the act so quoted to indicate that the Legislature intended to embrace restaurants, cafes, cafeterias, lunch or sandwich stands or counters, including or covering the sale of cigars and cigarettes, in the terms "store" or "mercantile establishment". . . (Emphasis supplied.)

The word "store" does not seem to contemplate a space located on a vacant lot or a vacant lot. This is a taxing statute and should be strictly construed. Where the legislative intent is doubtful, such doubt should be resolved in favor of the rights of the citizen and against the state. *Lovett v. Lee*, 141 Fla. 395, 193 So. 583. The act also contains a penal provision (§205.021, F. S.), which would necessitate a strict construction. See *Lee v. Smith, Richardson and Conroy*, 141 Fla. 535, 191 So. 767. (For other cases dealing with the word "store" see Vol. 10A, F.S.A.)

Therefore, §205.482, F. S., is not applicable to the operation of the vacant lot referred to in your letter as to either the operator of the lot or the tenant-lessee of the space or spaces on the lot (except insofar as it affects a person selling new items and required to be licensed for a store or stores located elsewhere).

The lot operator would be required to be licensed under §205.401, F. S., (previously §205.49, F. S.). Each individual lessee or stall occupant would be required to be licensed under §205.531, F. S. (previously §205.59, F. S.), since such occupant or lessee would be a person as defined in §205.031, F. S., and would be engaged in the business of ". . . trading, bartering, serving, or selling tangible personal property, as owner, agent, broker or otherwise . . ." In addition to the Jasper case referred to herein, also see AGO 063-68, Biennial Report of the Attorney General, June 21, 1963, which deals with a similar situation. The fact that the individuals bring their various items to the lot for display and sale to the general public clearly reflects the doing of business.

Your letter mentioned that new items are displayed and sold from the vacant lot. This may involve owners of retail stores bringing part of their merchandise to the lot to sell, thus involving people who would or should already be licensed under some other provision of the law, possibly §205.482, F. S. The status of such individuals is neither considered nor passed upon in this letter, pending additional information.

Former §205.06, F. S., referred to in your letter, does not appear to have been carried forward in Ch. 205, F. S., as amended and revised in 1967. Section 205.471, F. S., referred to in your letter, is not applicable since no service for the public in return for a consideration is performed.

068-55—April 9, 1968

OPERATION OF MOTOR VEHICLES

CHEMICAL TEST FOR INTOXICATION—QUALIFICATION OF OPERATOR OF MACHINE OR PERSON PERFORMING TEST

To: *Royce R. Lewis, Municipal Judge, Fort Pierce*

QUESTIONS:

1. Before the results of a breatholizer test can be received in evidence, must the operator of the machine hold a permit issued by the State Board of Health as stated in §322.262(3) F. S., even though such operator has previously been schooled and certified by another state agency?

2. What effect is had by §322.262(4), F. S., which requires trial by jury, in municipal courts where trials by jury are not provided for?

In answer to question 1, I would direct your attention to §322.262 (3), F. S., which provides as follows:

... Chemical analyses of the person's blood, urine, breath, or other bodily substance, to be considered valid under the provisions of this section, shall have been performed according to methods approved by the State Board of Health and by an individual possessing a valid permit issued by the State Board of Health for this purpose. The State Board of Health is authorized to approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the State Board of Health.

It would therefore appear that the chemical analyses of a person's blood, urine, breath, or other bodily substances, to be valid under the provisions of §322.262, F. S., must be performed by a person possessing a valid permit issued by the State Board of Health.

As to question 2, trials by jury in municipal courts for the violation of municipal ordinances pertaining to the driving and operation of motor vehicles while under the influence of intoxicating beverages to the extent that the normal faculties are impaired are not disturbed by the provisions of Ch. 67-308, Laws of Florida. This question was thoroughly discussed in AGO 067-75, Biennial Report of the Attorney General, Nov. 27, 1967.

However, I direct your attention to the fact that there is presently pending before the Supreme Court of Florida, the case of *Hilliard v. City of Gainesville* which involves the right of jury trial in a municipal court for the violation of a city ordinance that is identical to a state misdemeanor statute. This case is set for argument May 15, 1968.

The Municipal Court of Gainesville denied a request for jury trial and the Circuit Court reversed the Municipal Court. The District Court of Appeal, First District, on Feb. 22, 1968, reversed the judgment of the Circuit Court and reinstated the judgment of the Municipal Court. However, the question has been, under §4(2), Art. V, State Const., certified to the Supreme Court of Florida, as a question of great public interest and concern to all citizens of Florida.

068-56—April 9, 1968

MOTOR VEHICLES

SAFETY EQUIPMENT INSPECTION LAW, APPLICATION TO SERVICEMEN

To: *William A. Rooney, Major, USAF, Eglin Air Force Base*

QUESTIONS:

1. Is the serviceman required to comply with the Florida vehicle inspection requirements if his state of domicile has no safety inspection requirement?

2. If the serviceman's domicile has an annual inspection, would this be recognized as satisfying the requirements of Florida law?

3. If the Air Force establishes and operates an on-base inspection station, would this be recognized on an equal basis with other state inspections thereby relieving the serviceman from the requirements of Florida State inspection?

4. If the Air Force Base Exchange supervises an on-base inspection station operated on a concession basis by a private contractor, would this satisfy the Florida inspection requirements?

The 1967 Session of the Florida Legislature enacted Ch. 67-307, Laws of Florida, which has been codified and now appears in the 1967 Florida Statutes as Part II of Ch. 325. There can be no doubt but that it was the intent of the legislature in the enactment of Ch. 67-307 to reduce the ever-increasing motor vehicle accidents occurring upon the highways and streets of Florida by the removal of those vehicles that may be operating with faulty mechanical equipment.

Section 325.12, F. S., specifically provides that every motor vehicle registered or required to be registered with the state shall at all times display a current approved inspection certificate when the vehicle is operated upon any street or highway within the state. A similar provision is also contained in §325.15, F. S., which permits the owner of any motor vehicle brought into this state for the first time, which is required to be registered under the provisions of Ch. 320, F. S., to operate the motor vehicle for a period not to exceed 10 days from the date the motor vehicle was originally brought into the state.

The provisions pertaining to registration and display of license plates as contained in Ch. 320, F. S., do not apply to a motor vehicle owned by a nonresident of this state, other than a foreign corporation doing business in this state, provided the owner has complied with the laws of the foreign country, state, territory or federal district of his residence relative to motor vehicles and the operation thereof. (See §320.37, F. S.)

However, §320.38(1), F. S., specifically provides when nonresident exemption is not allowed as follows:

... The provisions of law authorizing the operation of motor vehicles over the highways of the state by nonresidents of this state, when such vehicles shall be duly registered or licensed under the laws of some other state or foreign country, shall not apply to any nonresident who shall accept employment, or engage in any trade, profession or occupation in this state. In every case where a nonresident shall accept employ-

ment, or engage in any trade, profession or occupation in the state, or shall enter his children to be educated in the public schools of the state, such nonresident shall be required to register his motor vehicles in this state, if such motor vehicles are proposed to be operated on the highways of the state.

Thus, we see that the exemption allowed a nonresident, as set out in §320.37, F. S., does not apply when the nonresident accepts employment, or engages in any trade, profession or occupation in this state, or enters his children to be educated in the public schools of this state. Therefore, it would appear that the facts and circumstances of each individual serviceman's residence in the state dictate as to whether or not he is required to comply with the Florida motor vehicle licensing and registration laws. This is so inasmuch as numerous servicemen stationed in the state have seen fit to declare it their legal state of residence and have upon meeting the necessary requirements voted in local, state, and federal elections. Many servicemen have seen fit to purchase homes in the state and file for homestead exemption. Wives and members of servicemen's families have on many occasions seen fit to become gainfully employed in businesses and professions unrelated and unconnected with the military service. Children in many instances have been placed in public schools to be educated at the expense of residents and taxpayers of Florida. Therefore, the provisions of §§320.37 and 320.38, F. S., depend upon the circumstances in each individual case.

The provisions of the Soldiers and Sailors Civil Relief Act (50 USC §574) give a nonresident serviceman broad immunity from personal property and income taxation. However, it would appear that the maximum amount allowed for the inspection of a motor vehicle under the provisions of Ch. 67-307, Laws of Florida, is not in the nature of tax imposed either upon a serviceman's income or personal property. The maximum fee of \$1.75 appears to be a regulatory fee enacted under the police power of the state for the primary purpose of defraying expenses in the inspection of motor vehicles in order to determine their mechanical fitness for operation upon the streets and highways of Florida. It is for the best interest of all concerned, including the owners and operators of all motor vehicles, that only mechanically-safe motor vehicles be operated.

Section 325.28, F. S., specifically provides that "... Every law enforcement officer of this state shall recognize any current official inspection sticker affixed to any motor vehicle from another state..." as meeting the requirements of this law. However, an inspection sticker from a sister state, or one issued in this state, is no assurance or guarantee that the motor vehicle will remain safe to operate during the time period for which the certificate was issued. The legislature has under §317.691, F. S., provided that the director and members of the Florida Highway Patrol, sheriffs and deputy sheriffs "... may at any time, upon reasonable cause to believe that a vehicle is unsafe or not equipped as required by law, ..." require the driver to stop and submit the vehicle to an inspection.

The Director of the Florida Department of Public Safety is charged with the duty of carrying out the provisions of Part II, Ch. 325, F. S.; and §325.22, F. S., provides that he shall cause periodic checks to determine inspections are being made in accordance with the law and to cause investigations to be made of bona fide complaints against an inspection station. Similar provisions as to the supervision of inspection stations are contained in §325.25, F. S. Therefore, based upon the above laws, your questions are properly answered as follows: Questions 1

and 2 are answered in the affirmative. Questions 3 and 4 are answered in the negative.

068-57—April 9, 1968

SUSPENSION OF PUBLIC OFFICERS

REMUNERATION FOR SERVICES WHILE SUSPENDED WHEN REINSTATED

To: *Harold F. Johnson, Attorney, Board of County Commissioners, Sanford*

STATEMENT OF FACTS:

The Justice of the Peace, Fourth District, Seminole County, Florida, was suspended by the governor on Dec. 1, 1967, and on Feb. 16, 1968, the Senate of the State of Florida voted not to remove said justice of the peace. However, on Feb. 17, 1968, the governor again suspended said justice of the peace.

QUESTION:

Is an officer reinstated after suspension by the governor entitled to remuneration of his office for the period of his suspension?

Based upon the above facts, you seek an opinion as to whether or not the suspended justice of the peace is entitled to remuneration for the period of time from the first suspension to his reinstatement in office.

Section 15, Art. IV, State Const., authorizes the suspension or removal of officers and specifically provides that: . . . "No officer suspended who shall under this section resume the duties of his office, shall suffer any loss of salary or other compensation in consequence of such suspension. . . ."

In *re* Advisory Opinion To Governor, 68 So. 450, the court at p. 451 said that when the: ". . . Senate affirmatively refuses to consent to the removal recommended by the Governor, then such previous suspension from office expires and comes to an end eo instanti upon the affirmative refusal of the Senate to consent to or concur in the removal recommended. . . ." Thus, the suspended officer at once resumed the duties of the office when the Senate refused to approve the suspension. See also *Hatton v. Joughin*, 138 So. 392, rehearing denied 145 So. 174.

Chapter 65-1045, Laws of Florida, is a population act applicable to Seminole County and provides that the justices of the peace shall be paid a fee of \$7.00, in lieu of all other fees heretofore charged, for each criminal case instituted before him. The Supreme Court of Florida has held that it is the office that earns the fee and commission as distinguished from the occupant of the office. See *Lee v. Smith*, 149 So. 67, 69; *Martin v. Karel*, 143 So. 317, 322; *Tyler v. Thomas*, 153 So. 848; *Rogers v. Bondy* 182 So. 281; *Hanchey v. State*, 52 So.2d 429.

In the case of *Wright v. MacVicar*, 88 So.2d 541, the court (in holding that a suspended constable was upon reinstatement entitled to all fees and compensation of the office for the period of suspension) said at p. 543:

* * * * *

It would seem to us highly technical to hold, when dealing

with a clear constitutional command that "[n]o officer * * * shall suffer any loss of salary or other compensation * * *", that a county officer in these circumstances, entitled to compensation solely by virtue of his office, may look to the county only for part payment of his claim and must appeal to the legislature for the balance because he cannot obtain full relief in court. We hold, therefore, that appellant is entitled to be compensated from county funds in the full amount claimed. This holding is not intended to be penal in nature, as appellees suggest. It is designed only to give practical effect, as a matter of construction, to a principle which seems to us implicit in the clear constitutional mandate.

Therefore, based upon the above-cited constitutional and statutory provisions and case law, it appears that the justice of the peace was vindicated by action of the Senate and immediately became entitled to the remunerations of the office for the period of his suspension. Your question is answered in the affirmative.

068-58—April 9, 1968

**HOUSING ACT OF 1964, TITLE VIII, PART 1 OF THE HOUSING
ACT OF 1967 AND TITLE IX OF THE DEMONSTRATION
CITIES AND METROPOLITAN DEVELOPMENT ACT OF 1966**

GOVERNOR, AUTHORITY TO ADMINISTER

To: Claude R. Kirk, Jr., Governor, Tallahassee

QUESTIONS:

1. Is the governor's office authorized to administer a state-wide urban information and technical assistance program and to receive and spend federal funds under the provisions of Title IX of the Demonstration Cities and Metropolitan Development Act of 1966 (P.L. 87-754; 43 U.S.C. 901-906)?
2. Is the governor's office authorized to administer a state-wide training and research program and to receive and spend federal funds under the provisions of Title VIII, Part 1 of the Housing Act of 1964 (P.L. 88-560; 20 U.S.C. 801)?

At the outset it should be remarked that neither of the aforecited enactments appears to designate your office as the agency to administer the programs under Titles VIII or IX. Indeed, as I understand these acts, and the 2 letters of request of March 21, 1968, from A. F. Smith of the U. S. Department of Housing and Urban Development, and your request, it is precisely to determine whether the governor's office may be so designated that my opinion has been requested.

It is indubitable that the governor, as such, is a creature of the Constitution, §1, Art. IV, State Const., and that the powers of the governor derive from the Constitution or statutes consonant therewith. The governor may not, therefore, represent the sovereignty of the state absent constitutional or statutory authorization. 24 Am. Jur. Governor §5; 15 Fla. Jur. Governor §§2 and 3.

The people of Florida are the matrix of this state's sovereignty, Preamble, State Const., for "All political power is inherent in the people." §2, DR, State Const.

The Constitution promulgated by the people of Florida in no obvious respect authorizes the governor to undertake the disposition of

such powers as your questions address. (See Art. IV, State Const., *inter alia*.) Nor has the legislature, pursuant to the authority vested in it by the people in §1, Art. III and secured by Article II, State Const., authorized the governor to undertake the disposition of such powers as your questions address. See for example, Ch. 14, F. S., *inter alia*.

Questions 1 and 2 must, therefore, be answered in the negative: the governor's office is not authorized to undertake the disposition of such powers as your questions address.

068-59—April 10, 1968

TAXATION

EXEMPTIONS FOR HOUSEHOLD GOODS OR FURNISHINGS AND PERSONAL EFFECTS—CONSTRUCTION OF 1967 AMENDMENTS TO §§192.201 AND 200.01, F. S.

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

Does §192.201, F. S., as amended by Ch. 67-378, Laws of Florida, and §200.01, F. S., as amended by Ch. 67-377, Laws of Florida, grant tax exemption for household goods or furnishings, personal effects and wearing apparel of residents of this state generally, or are such exemptions limited to these items as used in connection with the permanent residence of the taxpayer?

Section 192.201, F. S., was derived from Ch. 29743, Laws of Florida, 1955, which provided that:

... There shall be exempt from taxation to every person residing and making his or her permanent home in this state household goods and personal effects to the assessed value of one thousand dollars. Title to such household goods and personal effects may be held individually, by the entireties, jointly or in common with others.

Chapter 67-378, Laws of Florida, deleted from said §192.201, F. S., the phrase "to the assessed value of one thousand dollars," thereby removing the said \$1,000 limitation. Under the statutes the household goods and personal effects of "every person residing and making his or her permanent home in this state" are tax exempt, notwithstanding the value thereof. Section 11, Art. IX, State Const., provides that: "... [T]here shall be exempt from taxation to the head of the family residing in this State, household goods and personal effects to the value of Five Hundred Dollars, ..." The 1955 and 1967 laws appear to have been attempts by the legislature to expand and increase the tax exemption provided by §11, Art. IX, State Const.

Section 200.01, F. S., as amended by Ch. 67-377, Laws of Florida, redefines "tangible personal property" for the purpose of ad valorem taxation, defining such property as including:

"... [A]ll goods, chattels, vehicles (except motor vehicles and household furnishings, wearing apparel, effects of the person actually employed in the use of serving the creature comforts of the owner and not held for commercial purposes), animals and other articles of value capable of manual posses-

sion and whose chief value shall consist of the thing itself and not what it represents. . . .

It appears to have been the intention of the legislature to exclude from the tangible personal property taxing laws of the state ". . . motor vehicles and household furnishings, wearing apparel, effects of the person [taxpayer] actually employed in the use of serving the *creature comforts* of the owner and not held for commercial purposes . . ." (Emphasis supplied.) and thereby exempt such properties from ad valorem taxation. The term "creature comforts" used above is defined in the dictionaries as "things that give bodily comfort; food, clothing and shelter are creature comforts." (The World Book Encyclopedia Dictionary.) Webster's Dictionary defines the same term as "things, such as food and warmth, that promote physical comfort and satisfaction."

There has been a contention by many, if not most, of the taxing officials for years that the cost and expense of assessing and collecting ad valorem taxes against household goods and personal effects probably equal or may exceed the actual taxes against household goods and personal effects. This has been used as an argument against the taxation of household goods and personal effects.

The tax exemption, raised by reason of the amendment of §200.01, F. S., by Ch. 67-377, Laws of Florida, of household furnishing[s], wearing apparel and effects of the person (owner) actually employed in serving creature comforts of the owner not held for commercial purposes, differs little, if at all, from that contained in §192.201, F. S., as amended by Ch. 67-378, Laws of Florida, which exempts household goods and personal effects of resident owners. The five hundred dollar limitation imposed by §11, Art. IX, State Const., appears to have been dropped in the legislation above-mentioned, in each of the above-mentioned statutes as amended. Although said §11, Art. IX, State Const., limited the exemption to heads of families residing on the property, this requirement appears to have been dropped by the statutes.

It, therefore, appears that it was the intention of the legislature, when it enacted said Chs. 67-377 and 67-378, Laws of Florida, amending §§192.201 and 200.01, F. S., to remove from the statutory definitions of tangible personal property references to household furnishings, wearing apparel, effects of the person actually employed in the use of serving the creature comforts of the owner and not held for commercial purposes, so that such property will no longer be deemed tangible personal property for purposes of taxation. I am here assuming the constitutionality of said acts and laws.

068-60—April 16, 1968

**HOUSING ACT OF 1964, TITLE VIII, PART 1 OF THE HOUSING
ACT OF 1967 AND TITLE IX OF THE DEMONSTRATION CITIES
AND METROPOLITAN DEVELOPMENT ACT OF 1966**

**FLORIDA DEVELOPMENT COMMISSION, AUTHORITY TO
ADMINISTER**

To: Claude R. Kirk, Jr., Governor, Tallahassee

QUESTIONS:

1. Is the Florida Development Commission authorized to administer a statewide urban information and technical assistance program and to receive and spend federal funds under the provisions of Title IX of the Demonstration Cities and Metro-

politan Development Act of 1966 (P.L. 89-754; 43 U.S.C. 901-906)?

2. Is the Florida Development Commission authorized to administer a statewide training and research program and to receive and spend federal funds under the provisions of Title VIII, Part 1 of the Housing Act of 1964 (P.L. 88-560; 20 USC 801)?

The legislature, in its 1967 Session, created the office of state planning under the state planning and budget commission. (§23.011, F. S.)

The office of state planning is mandated the responsibility and powers to coordinate all state planning and programming relative to "... housing and urban development; ..." among other broad social programs, §23.011(2), F. S., to assist the federal government and any local, county, metropolitan or regional governmental agencies, §23.012(6), F. S., to accept and administer federal funds and to contract for the provision of services related thereto, §23.012(8), F. S., and even to utilize federal funds to contract for the provision of specialized services, §23.017, F. S.

In fine, the legislature has invested the office of state planning, under the state planning and budget commission, with comprehensive responsibility and authority for such programs as would appear to be contemplated by the federal acts here in point.

Although §§288.03(16), 288.09 and 288.32, F. S., antedating Ch. 23, F. S., do empower the Florida Development Commission to receive, administer and disburse federal funds, such authority would seem operative only when "the Legislature has not designated another state officer, board, bureau, commission, department, or agency in relation thereto" §288.03(16), F. S. Yet, as stated, the legislature has obviously so designated the office of state planning under the state planning and budget commission.

I solicit your attention, further, to §216.20, F. S., which establishes procedures precedent to request for federal funds by any agency of the state government.

068-61—April 19, 1968

ARREST WARRANTS

POWER TO ISSUE—CONSTRUCTION OF TERM "MAGISTRATE"—DEPUTY CLERK OF THE CITY OF BOCA RATON

To: *Malcolm Anderson, City Attorney, Boca Raton*

QUESTIONS:

1. Does a deputy clerk of the court of the City of Boca Raton, who is not connected with law enforcement, have the authority to take affidavits charging violations of city ordinances and to issue arrest warrants upon the basis of such affidavits?

2. If the answer to question 1 is in the affirmative, does a deputy clerk of said court, who is also a city police officer, have the authority to take affidavits charging violations of city ordinances and to issue arrest warrants upon the basis of such affidavits?

AS TO QUESTION 1:

Chapter 67-1116, Laws of Florida, amended §6.04 of the Charter of the City of Boca Raton to read as follows:

The City Clerk shall, on recommendation of the Municipal Judge, designate a clerk of the Court and deputy clerks, who shall keep a record of all its proceedings, have the power to make certified copies of official papers of the Court, take affidavits, and issue warrants of arrest and subpoenas. (Emphasis supplied.)

The Fourth Amendment to the United States Constitution provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In *Giordenello v. United States*, 2 L. Ed. 2d 1503, 1509, the U. S. Sup. Ct. said:

. . . The language of the *Fourth Amendment*, that ". . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing . . . the persons or things to be seized," of course applies to arrest as well as search warrants. . . . (Emphasis supplied.)

In *Johnson v. United States*, 92 L. Ed. 436, 440, the U. S. Sup. Ct. said with respect to the Fourth Amendment:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. * * * (Emphasis supplied.)

I understand the United States Supreme Court's pronouncements in *Mapp v. Ohio*, 6 L. Ed. 2d 1081, 1090; *Ker v. California*, 10 L. Ed. 2d 726, 736; and *Aguilar v. Texas*, 12 L. Ed. 2d 723, 726, as standing for the proposition that the Fourth Amendment, insofar as it concerns search and seizure, applies to the states through the Fourteenth Amendment.

In view of its said pronouncements, I apprehend that the United States Supreme Court would also apply the Fourth Amendment, insofar as it concerns arrest warrants, to state arrest warrants. As I see it, there is no less reason why a neutral and detached magistrate should pass upon whether an arrest warrant is to be issued than there is for such a magistrate to pass upon whether a search warrant should be issued; a man should not be deprived of his personal liberty under an arrest warrant without observing safeguards equal to those which must be observed in order to obtain a search warrant to search his premises. [The United States District Court for the Southern District of Florida has applied the *Johnson v. United States* Fourth Amendment doctrine to a municipal arrest warrant (*United States v. Melvin*, 258 F.Supp. 252).]

Therefore, I think that the Johnson standards are to be applied through the Fourteenth Amendment to state arrest warrants and that such a warrant may be issued only after a "neutral and detached magistrate" has weighed the evidence presented to him and has determined that it justifies the issuance of an arrest warrant. [It appears that municipal action under authority of state law is state action within the contemplation of the Fourteenth Amendment (see *Lovell v. Griffin*, 82 L. Ed. 949, 953), and therefore a municipal arrest warrant issued under authority of state statute is state action within the purview of said Amendment.]

This brings us to a consideration of whether a deputy clerk of the Court of the City of Boca Raton, who is in no way connected with law enforcement, can be considered "a neutral and detached magistrate" as those words are used in the foregoing quotation from *Johnson v. United States*.

I think that he can be so considered because when, acting pursuant to the above-quoted §6.04 of the City Charter, he takes an affidavit and issues an arrest warrant, he performs the function of a magistrate and is a magistrate, although said §6.04 does not refer to him as a magistrate.

It is said in 5 Am. Jur. 2d 703, Arrest, §10, that:

*While the power to issue warrants is most frequently excused [sic] by justices of the peace and police magistrates, it can be conferred by statute on other officials. Although this power implies the power and duty to hear and determine probable cause, it is not such a judicial power that it cannot, for example, be conferred by statute on clerks of court. * * * (Emphasis supplied.)*

The federal extradition law (now §3182, Title 18, USCA) has always prescribed that extradition of a fugitive from one state to another may be based upon an "affidavit made before a magistrate" in the demanding state, charging the demanded person with crime.

Compton v. Alabama, 214 U.S. 1, involved extradition proceedings based upon an affidavit charging crime which had been made before a Georgia notary public. The United States Supreme Court held that said notary public was a magistrate within the meaning of the federal extradition statute because he was regarded as a magistrate under the law of Georgia. In its discussion of the meaning of the word "magistrate," the Court said:

... In a general sense a magistrate is a public civil officer, possessing such power, legislative, executive or judicial, as the government appointing him may ordain. In a narrow sense, a magistrate is regarded—perhaps commonly regarded—as an inferior judicial officer, such as a justice of the peace. 2 Bouvier Law Dic. 92. But the appellation of magistrate "is not confined to justices of the peace, and other persons, ejusdem generis, who exercise general judicial powers; but it includes others whose duties are strictly executive." Anderson's Dictionary of Law, 643, 644. ... (Emphasis supplied.)

In *State v. McLeod* (Fla.), 194 So. 628, the Supreme Court of Florida in effect held that an affidavit made before a deputy clerk of the City Court of Rochester, N. Y., was made before a magistrate within the purview of the federal extradition statute. The ruling was bottomed upon a New York statute which provided that:

... The judges may appoint to hold office during their pleasure a clerk of the criminal branch of the city court, who is a confidential appointee of said judges, a deputy clerk, and such other subordinates as may be prescribed by the board of estimate and apportionment. The clerk, the deputy clerk and other clerks appointed by the said judges each has power to take informations upon which warrants for the arrest of persons charged with the commission of a crime, or a violation of an ordinance, may be issued by the city judges; . . . (Emphasis supplied.)

In *People v. Britt* (N.Y.), 92 N.Y.S.2d 662 (affirmed on appeal, 93 N.Y.S.2d 704), it was held that an Indiana Clerk of the Circuit Court, before whom the affidavit of the complaining witness in a criminal case was sworn to, was a magistrate within the meaning of the federal extradition statute. In dealing with the point, the New York court said (p. 666):

It thus appears that, where the prosecution is by affidavit under the Indiana statutes, the prosecuting attorney is empowered to determine whether to file the charge and the clerk is authorized to issue the warrant thereon, in the absence of any direction by a court or judge. Under this procedure, the clerk functions as the magistrate. He issues the warrant of arrest. He is the only public official to whom the matter is presented by the prosecuting attorney in order to initiate the prosecution. It is obviously appropriate that the affidavits of the witnesses should be taken before the clerk and such affidavits are, in my opinion, affidavits "made before a magistrate" within the meaning of the Federal statute. (Emphasis supplied.)

Marks v. Eckerman (C.A., D.C.), 23 F.2d 761, concerned the question of whether the clerk of a municipal court in Ohio was a magistrate under the federal extradition statute. The court said (p. 762):

By section 1579-536 of the Ohio Code a clerk of the municipal court is clothed with the powers and duties of a clerk of the police court. Section 4594 of the Ohio Code clothes the clerk of the police court with authority to issue warrants of arrest and search warrants. That section reads in part as follows: "When an affidavit is filed with him (clerk) for a peace warrant, search warrant, or charging any person with the commission of an offense, the clerk of police court shall have power to issue a warrant under the seal of such court to arrest the accused or search the place described." (Emphasis supplied.)

* * * * *

A municipal court clerk in Ohio, having the status there of a magistrate, will be so regarded here. . . . (Emphasis supplied.)

In *Ex Parte Noel* (Ky.), 338 S.W.2d 903, 906-907, the Ky. Ct. of App. ruled that an Alabama circuit solicitor was a magistrate within the contemplation of the federal extradition statute, by reason of an Alabama statute providing that:

Every circuit solicitor, deputy circuit solicitor, assistant deputy circuit solicitor, county or other solicitor by whatever name called within the circuit, county or other territory for

which he is elected or appointed shall have the power to take oaths in support of complaints and to issue warrants in all criminal cases, provided, that such warrants shall be made returnable to a court having original jurisdiction of the offense charged. (Emphasis supplied.)

In *Kreulhaus v. City of Birmingham* (Ala.), 51 So. 297, 298-299, (not involving extradition), the Supreme Court of Alabama had the following to say as to who is a magistrate:

The act creating the inferior court of criminal jurisdiction in the city of Birmingham conferred upon the clerk the power to issue warrants of arrest. It is argued that the issue of warrants of arrest is a judicial power, which can be conferred only upon a judicial officer. It implies the power and the duty to hear and determine the question of probable cause. The principle of this contention was long ago disposed of by the decisions of this court. In Ex Parte Gist, 26 Ala. 156, it was argued with great learning that the section of the judiciary act of the United States conferring power upon justices of the peace to arrest, imprison, or bail persons charged with a violation of the criminal law of the United States, was repugnant to the Constitution of the United States for the reason that it conferred judicial power upon one not an officer of the United States, whereas that Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such other inferior courts as Congress may, from time to time, ordain and establish. This court, conceding that the power and authority conferred was judicial in its nature, held that it did not fall within the meaning of "judicial power" in the sense in which that term is used in the Constitution of the United States. And the court referred to the case of Gaines v. Harvin, 19 Ala. 491, where a similar provision in our Constitution came under review, and where it was held that it was not the intention of the framers of the Constitution to deny to the Legislature the power to confide to ministerial officers, who do not constitute a part of the judiciary, properly so called, many duties involving inquiries in their nature judicial. In the case referred to it was said: "The practice of this as of all other governments having their judicial, executive, and legislative departments separate and distinct very clearly shows that, in the administration of laws, inquiries partaking of the nature of judicial investigations are confided to persons other than judges, whose acts have never been questioned on constitutional grounds"—and more in the same line. The statute in this case conferred no power upon the clerk to finally hear and determine, nor even to commit to bail, but only to issue warrants, which must be construed to authorize him to issue warrants on probable cause, supported by oath or affirmation, and returnable, by necessary implication, to the court from which they are issued. We are not prepared to say that this was an unconstitutional exercise of power. In re Siebert, 61 Kan. 112, 58 Pac. 971; State v. Sureties of Krohne, 4 Wyo. 347, 34 Pac. 3; In re Durant, 60 Vt. 176, 12 Atl. 650. (Emphasis supplied.)

Also see *Holloman v. State* (Ala.), 74 So.2d 612; and *Mahaley v. State* (Ala.), 103 So.2d 824.

Upon the basis of the above-cited authorities, I am of the opinion that §6.04 of the Boca Raton City Charter has the legal effect of making a deputy clerk of said city's court a magistrate. Therefore, I conclude that question 1 is properly answered in the affirmative, since the deputy clerk mentioned therein has no connection with law enforcement.

AS TO QUESTION 2:

It will be noted from the above quotation from *Johnson v. United States* that the United States Supreme Court in effect held that the Fourth Amendment requires the evidence presented as the basis for the issuance of a search warrant to be weighed by a neutral and detached magistrate "instead of by the officer engaged in the often competitive enterprise of ferreting out crime."

As indicated above, the Fourth Amendment is equally applicable to arrest warrants, which means that the evidence tendered in support of the issuance of an arrest warrant must also be weighed by a neutral and detached magistrate rather than by an officer engaged in the business of ferreting out crime.

As further indicated above, I think that these principles apply to the states, and hence to the City of Boca Raton when acting under authority of state law (under §6.04 of its Charter).

A police officer of the City of Boca Raton is engaged in the enterprise of ferreting out crime; he is not neutral and detached. Therefore, I conclude that question 2 is properly answered in the negative.

068-62—April 19, 1968

SALES TAX

COMMUNICATION SERVICES—EXTENT OF IMPOSITION OF TAX BY CH. 212, F. S., AS AMENDED BY CH. 68-27, LAWS OF FLORIDA

To: *J. Ed Straughn, Director, State Revenue Commission, Tallahassee*

QUESTIONS:

1. Are communication services generally taxable under Ch. 212, F. S., as amended, or are the communication services which are taxable restricted to those enumerated in §212.05(5), F. S.?

2. If the communication services which are taxable are limited to those specifically mentioned in §212.05(5), F. S., are all charges for installation of telephonic and telegraphic equipment taxable, or would the tax apply only to the charges for the installation of equipment related or incidental to the taxable services enumerated in §212.05(5), F. S.?

Prior to the amendment of Ch. 212, F. S., by Ch. 68-27, Laws of Florida, §212.08(7), F. S., where materially provided:

. . . Likewise exempt are newspapers, *communication services*, film rentals where an admission is charged for viewing such film and charges for services rendered by radio and television stations, including line charges, talent fees or charges, and charges for films and transcriptions and other expendable items in producing radio or television broadcasts. (Emphasis supplied.)

The above-quoted section was amended by Ch. 68-27, Laws of Florida, to read as follows: ". . . Likewise exempt are newspapers, film rentals

where an admission is charged for viewing such film and charges for services rendered by radio and television stations, including line charges, talent fees or charges." Note that "communication services" have been deleted from the exemption. This is clearly an expression of the legislature that "communication services" are no longer considered exempt from the taxes imposed by Ch. 212, F. S. This removes the barrier to the imposition of a tax on "communication services."

The question of whether "communication services" may or may not have been considered as "tangible personal property" prior to the enactment of Ch. 68-27, Laws of Florida, is presently irrelevant inasmuch as the legislature has now specifically levied a tax on those specific "communication services" enumerated in §212.05(5), F. S., as amended by Ch. 68-27, Laws of Florida.

I must next ascertain to what extent the legislature has imposed a tax on "communication services." Initially, I note that "... charges for services rendered by radio and television stations, including line charges, talent fees or charges," are exempted. (§212.08(7), F. S., as amended.)

Section 212.05(5), F. S., as amended, levies the tax as follows:

... [A]ll telegraph messages and long distance telephone calls, beginning and terminating in this state, and recurring charges to regular subscribers for local telephone service, and all charges for the installation of telephonic and telegraphic equipment and at the same rate on all charges for electrical power or energy.

As I read this it means that the legislature has imposed a tax on the following specific "communication services":

1. Charges for all telegraph messages and long distance telephone calls, beginning and terminating in this state.
2. Recurring charges to regular subscribers for local telephone service.

3. All charges for the installation of telephonic and telegraphic equipment. (Electrical power or energy is not "communication services.")

Therefore, in answer to question 1, the only taxable "communication services" are those specifically enumerated in §212.05(5), F. S.

Number 1 above would include all long distance telephone calls originating and terminating in this state regardless of the source. These calls would be taxable whether originating from a public telephone station or from a private home or from a location having a semipublic telephone. The amount of the tax would be as set forth in §212.12(10), F. S., as amended by Ch. 68-27, Laws of Florida, to include taxable "communication services." Where individuals make long distance calls from their own private phones these calls would be taxable and added to the individual billing. No duplication would occur since the long distance calls are treated individually while the monthly billing is a recurring charge to a regular subscriber.

To further clarify, each individual long distance call constitutes one taxable transaction, while each monthly billing would be one taxable transaction as a recurring charge to a regular subscriber. These are mutually independent taxable transactions, each constituting a separate and distinct taxable incident.

The legislature has not levied the tax on a call originating from public pay telephone stations, except where such call is a long distance telephone call originating and terminating in this state.

I am advised that there are instances where individuals have installed what are referred to as semipublic telephones. In these situations I am advised that there is frequently a set charge or minimum

charge for such a semipublic telephone. The set charge or minimum charge would constitute a recurring charge to a regular subscriber and would be taxable. However, each individual local call made through the use of the coin-operated semipublic telephone would not be taxable since it is neither a long distance call nor a recurring charge to a regular subscriber. However, long distance calls made from such semipublic telephones would be taxable, provided such long distance calls originated and terminated in this state.

In category 3 the legislature has imposed the tax on "...all charges for the installation of telephonic and telegraphic equipment. . ." (Emphasis supplied.) No blanket tax is imposed on installations of all communications equipment. Only charges for the installation of telephonic and telegraphic equipment are taxed. This would exclude charges for the installation of all equipment other than equipment classed as telephonic or telegraphic. The words "telephonic" and "telegraphic" are not defined in the law.

Thus, all charges made for the installation of telephonic and telegraphic equipment would be taxable. This answers question 2. The legislature has clearly imposed the tax on all charges for installation of telephonic and telegraphic equipment. It has not limited the imposition to charges related or incidental to the taxable services enumerated in §212.05(5), F. S. Had the legislature so desired, it could easily have done so. It is not the prerogative of this office to deviate from the clear language of the statute, and the will of the legislature as expressed in the statute.

Sales of all tangible personal property including telephonic and telegraphic equipment would be taxed in the customary manner. Where there is an installation charge or service charge in connection with or incidental to the sale of equipment, such would seem to constitute part of the "sales price" as defined in §212.02(4), F. S., and would be taxable accordingly. (Also see §212.02(5), F. S.)

This is a taxing statute with a penal provision. This means that the statute must be strictly construed against the taxing power and in favor of the taxpayer. *Lee v. Lovett*, Fla. 141 395, 193 So. 583. All doubts and ambiguities are resolved in favor of the taxpayer. Taxes cannot be imposed except in clear, unequivocal language. Taxation by implication does not exist.

068-63—April 22, 1968

HUSBAND AND WIFE

VALIDITY OF MARRIAGE PERFORMED IN GEORGIA PREDICATED ON LICENSE ISSUED IN FLORIDA

To: *Monroe W. Treiman, Executive Secretary, County Judges Association of Florida, Brooksville*

QUESTION:

Is a marriage performed in Georgia predicated on the issuance of a Florida marriage license valid?

It is the general rule that the validity of a marriage is determined by the law of the place where the contract was entered into and the ceremony performed. See Annotation at 61 A.L.R. 2d 849 at 856, citing among other cases, *White v. White*, 41 Ga. App. 394, 153 S.E. 203.

Although common-law marriages are no longer recognized in Florida

under the amended provisions of §741.211, F. S., they are recognized in Georgia. See *Kicklighter v. Kicklighter*, 217 Ga. 54, 58-59, and *Peacock v. Peacock*, 196 Ga. 441, 446. While the Annotated Code of Georgia does provide for marriage licenses, See Ga. Code Ann. Chap. 53-2, compliance with the same is not essential to the validity of the marriage contract as such provisions appear to be directory rather than mandatory as to the marital relationship. See *Lefkoff v. Sicro*, 189 Ga. 554, 560.

Accordingly, it would seem that while the ceremony in question should have been predicated upon the issuance of a Georgia marriage license, the fact that a Georgia license was not issued would not serve to invalidate a ceremony performed in that state. Thus it appears that the marriage in question was a valid one under Georgia law but even if it wasn't it would still be recognized as a common-law marriage under the law of that state which controls since that was the jurisdiction in which the marriage was performed. Your question is answered in the affirmative.

068-64—June 5, 1968

STATE AND COUNTY RETIREMENT SYSTEM

SURVIVING SPOUSE—AUTHORITY TO MAKE CONTRIBUTIONS TO FUND FOR PAST SERVICE CREDITS AFTER EMPLOYEE'S DEATH

To: *V. Carroll Webb, General Counsel, Office of Comptroller, Tallahassee*

QUESTION:

If the general counsel for the office of State Treasurer received compensation for special services as a deputy receiver, such compensation being paid by the court having jurisdiction over the receiverships, and if no public moneys were involved, may such fees be considered in determining the average final compensation of the general counsel under §122.02(2), F. S.?

Under §122.02(1), F. S., state and county officers and employees are defined as "full-time officers or employees who receive compensation for services rendered from state or county funds, . . ." Certain exceptions are added, but none of these would apply to a deputy receiver appointed for the rehabilitation or liquidation of insurance companies, and paid from receivership funds, as is the case here.

The employee in question had died prior to any claim for inclusion of the receivership employment time and compensation in determining the average final compensation which shall be paid to the surviving widow. No contribution to the retirement fund had been made from receivership compensation during the life of the employee.

My predecessor, now Justice Richard W. Ervin, answered this same kind of question in a letter dated Sept. 28, 1962, and addressed to the then State Comptroller, Honorable Ray E. Green. I quote in part:

Under §122.08(4), Florida Statutes, an employee, qualified for retirement, under the circumstances therein mentioned, who dies without making certain elections will be presumed to have "retired on the date of his death." . . . We find nothing in the statutes, other than in §122.08(10), Florida Statutes, permitting the making of such contributions after the death of the employee . . .

The letter expressed grave doubts that the surviving spouse of a deceased employee may pay contributions necessary for past service credits after the death of the employee, and the State Comptroller at that time was advised to refuse to accept such contributions absent the direction of a court of competent jurisdiction so holding. There has been nothing in the interim to change this situation. Therefore, your question is answered in the negative.

068-65—June 5, 1968

PUBLIC FUNDS

INSUFFICIENT APPROPRIATION—AUTHORITY OF STATE PLANNING AND BUDGET COMMISSION TO RELEASE ADDITIONAL FUNDS FOR PAYMENT OF EXPENSES

To: *Judicial Administrative Commission, Supreme Court Building, Tallahassee*

QUESTION:

May additional funds be released by the State Planning and Budget Commission for the payment of salaries and expenses on behalf of circuit judges, official court reporters, and other related functions of the judiciary in excess of appropriations made to circuit courts and other related matters by the general appropriations act?

This question contemplates the payment of state public funds from the state treasury upon the release of such public funds on order of the State Planning and Budget Commission, a statutory board (see Ch. 216, F. S.). When there is no express appropriation therefor, §4, Art. IX, State Const., requires that: "No money shall be drawn from the Treasury except in pursuance of appropriations made by law." This means that before moneys may be paid from the state treasury there must be an appropriation of such moneys to public use made either by the legislature by bill properly introduced into the legislature and properly passed by both houses and submitted to the governor and approved or permitted by him to become a law without his approval, or in lieu thereof there must be an appropriation of public funds in the state treasury by some provision found in the State Constitution.

The question contemplates a condition where the legislature has made an appropriation for the purposes contemplated by the question, which will be insufficient for the proper operation of the courts and the payment of costs and expenses for the present level of operation. Reported cases seem to recognize both constitutional and statutory appropriations. However, the reported cases, not only in Florida but elsewhere, clearly contemplate that before moneys may be paid from the state treasury, that there be an appropriation, constitutional or statutory, authorizing payments from the state treasury.

The only appropriations I have been able to find in the statutes and session laws of Florida, in addition to specific appropriations contained in the current statutes and laws, from which moneys in excess of the appropriations made by the legislature may be paid, appear to be the emergency and deficiency appropriations made by section 2, Ch. 67-300, Laws of Florida, (§282.01(2), F. S.). The funds provided by said section may be paid out only for needs arising as a result of an emergency or deficiency, as the case may be. This seems to bring us

down to the question of whether or not there may exist a constitutional appropriation from which such funds might be obtained.

The provisions of Ch. 216, F. S., for the setting up and approval of work budgets by the State Planning and Budget Commission, as authorized and provided for in said chapter, may not be construed as authorizing the making of appropriations by the said commission. The commission acts upon appropriations made by the legislature and budgets the same for purposes of the legislative or constitutional appropriations.

In Opinion of Justices, 145 Fla. 375, 199 So. 350, there had been submitted by the 1939 Regular Session of the Legislature a constitutional amendment to be voted on at the 1940 General Election, increasing the membership of the Supreme Court of Florida from 6 justices to 7 justices, which amendment was duly adopted at the general election in 1940, thereby increasing the membership of the said court from 6 to 7 justices. This constitutional amendment required that in the event of its ratification: "It shall thereupon be the duty of the Governor to appoint one additional Justice of the Supreme Court and he shall hold office from the date of his appointment until Tuesday after the first Monday in January, 1943," whose successor was to be elected at the general election in Nov. 1942. Chapter 19262, 1939, which became a law on June 30, 1939, and provided that: "From and after July 1, 1939, the salaries of the Justices of the Supreme Court of Florida shall be the sum of Seventy-five Hundred Dollars each per annum," carried its own appropriation from the state treasury. Section 1, Ch. 19280, 1939, (the general appropriations act) appropriated for the Supreme Court for the fiscal years beginning July 1, 1939 and July 1, 1940, "Salaries . . . \$73,660.00." The justices advised the governor that:

You are advised that chapter 19262, Acts of 1939, fixes the salary of Justices of the Supreme Court at \$7,500.00 per year and makes a continuing appropriation from any funds in the State Treasury not otherwise appropriated, for their payment . . . The legislature which submitted the amendment for a seventh Justice, recently approved, passed the latter act and must have had a seventh justice in contemplation.

In their Advisory Opinion (199 So. text 352) the justices remarked that: "In regard to the compensation for a secretary for Judge Adams, we are of the opinion that it may be legally paid from the Contingent appropriation for the Supreme Court to July 1, 1941, when that appropriation expires. It is a contingency that the adoption of the amendment for a Seventh Justice created and the people must have had it in mind when they approved that amendment, as they made it effective when approved." Here the justices appear to have proceeded on the theory of an implied appropriation from the particular circumstances and not on any constitutional appropriation.

The Advisory Opinion to the Governor, 114 Fla. 520, 154 So. 154, involved a circumstance where the General Appropriations Act of 1933, for the operation of certain state offices was insufficient to pay the salaries of such officers, as fixed by salary act or acts relative to such offices and officers. This raised the question in the mind of the governor whether salaries of the officers involved, fixed by statute duly enacted, might be paid, where the appropriations act providing for such salaries was insufficient to pay the same. The justices held that §3, Art. XVI, State Const., which requires that: "The salary of every officer shall be payable monthly upon his own requisition." was of itself a constitu-

tional appropriation for the payment of the salaries fixed by law for state officers, even though the legislative appropriation contained in the general appropriations act was not sufficient. However, this relates only to officers and their salaries, not to state employees and other subjects of appropriation not involving officers. Although the justices in their opinion in said 114 Fla. 520, 154 So. 154, appear to have treated official court reporters as state officers, the justices, in Opinion of Justices, 120 Fla. 729, 163 So. 76, specifically held that "official Court Reporters *are not state officials*, but are officially employed court functionaries . . ." This opinion of justices appears to have been confirmed by the Supreme Court in Glendinning v. Curry, 153 Fla. 398, 14 So.2d 794, text 799. These two reports raise serious question of the further application of Advisory Opinion, 114 Fla. 520, 154 So. 154, on the basis of §3, Art. XVI, State Const.

In State v. Lee, 121 Fla. 815, 164 So. 536, the court deemed the provisions of §15, Art. IV, State Const., that: "No officer suspended shall under this section suffer loss of salary or other compensation in consequence of such suspension" was sufficient constitutional appropriation to permit the payment of the loss sustained by the suspended officer, if any. In State v. Bloxham, 26 Fla. 407, 7 So. 873, the court held that where the constitution prescribed the salary of an officer, fixing the amount thereof, an appropriation in excess of such amount would not permit the payment of a sum in excess of the salary fixed by the constitution.

The above-stated question is answered in the negative, except as to additional circuit judges which may be authorized by reason of increased populations reflected by the 1970 census.

By your supplemental letter of April 11, 1968, you direct my attention to the wording of §27.15(2), F. S., that:

... When any state attorney is required to go beyond the limits of the circuit in which he holds office to comply with this section or on other official business performed at the direction of the governor, the expenses incurred shall be borne by the state and shall be paid from the appropriation provided by the state for circuit courts.

Prior to the amendment of said section by section 1, Ch. 67-324, Laws of Florida, such expenses were paid from "any funds in the state treasury not otherwise appropriated," usually from the general revenue fund. Under the 1967 amendment such expenses would be payable from Item 735, section 1, Ch. 67-300, Laws of Florida, (§282.01(1), F. S.), the 1967 General Appropriations Act, which is limited to an overall sum of \$107,500 for each of the fiscal years of 1967-1968 and 1968-1969, and not from the general revenue fund. In addition to this appropriation the appropriations for the several state attorneys, under the heading "Lump Sum," are provided ranging from \$1,000 for the 16th Judicial Circuit for current fiscal year to \$98,540 for the 6th Judicial Circuit for the same fiscal year. However, the term "lump sum" is not explained in the act, and may not include expenses of the state attorney when assigned to another circuit, in the light of Item 735 above-mentioned. If such appropriations prove insufficient for such purposes, it would seem the deficiency appropriation may be resorted to when funds are still available in it. I find nothing in the statutes or constitution of the state providing additional funds when the above-mentioned sources have been exhausted. Such deficiency appropriations, as well as the emergency appropriations, may be used only in accordance with

section 2, Ch. 67-300, Laws of Florida (§282.01(1), F. S.), the General Appropriations Act.

Section 112.061, F. S., governs and provides the amounts payable to public officers and employees as per diem, and the amounts that may be expended for travel by public officers and employees. It does not make its own appropriation for the payment of such per diem and expenses, but is dependent upon funds being otherwise appropriated to the spending agency for such purposes.

068-66—June 5, 1968

JUVENILE COURTS

JUVENILES—AUTHORITY OF COURT TO DETAIN

To: *Frank A. Orlando, Judge, Juvenile Court, Broward County, Fort Lauderdale*

QUESTION:

If a child commits an act which places him within the definition of a "child in need of supervision" as set out in Ch. 39, F. S., may that child be placed in detention prior to the adjudicatory hearing in his case, notwithstanding the limitations placed on the powers of the juvenile court with reference to that child subsequent to the adjudicatory hearing?

I call your attention to §39.03(3), F. S., which states:

... The person taking and retaining a child in custody shall notify the parents or legal custodians of the child and the principal of the school in which said child is enrolled at the earliest practicable time, and shall, without delay for the purpose of investigation or any other purpose, deliver the child, by the most direct practicable route, to the court of the county or district where the child is taken into custody, or, if the judge has so ordered, to a detention home or licensed child caring institution or county or city jail, within the county or district, designated by the judge, and shall at the earliest practicable time report in writing to the court the facts by reason of which the child was taken into custody. The child shall not under any circumstances be placed in any police or other vehicle which at the same time contains an adult under arrest, nor in a jail, police station, or other place of detention, *except on general or special order of the judge*; providing, however, where the child is involved in the same offense or transaction with adults, then such child may be transported in the same vehicle with the adults so involved. (Emphasis supplied.)

It seems apparent from the language in §39.03(3), F. S., that a child can only be placed in detention upon the specific order of the judge in a facility specifically designated by the judge.

Your letter makes specific reference to the term "child in need of supervision." Clearly, this term designates a type of factual situation whereby a child may be placed in a detention facility. However, as defined by §39.01(12)(a), F. S., and when read in conjunction with all of Ch. 39, F. S., it becomes clear that a juvenile can only be declared a child in need of supervision by the juvenile court judge. Further, the various facts which must of necessity be considered in making this

type of determination go directly to the adjudicatory hearing process. It is the juvenile court that must determine whether a child has committed an act or acts which place him within the definition of a child in need of supervision as set out in Ch. 39, F. S. Your question is answered in the negative.

068-67—June 5, 1968

PUBLIC LANDS

DISPOSITION OF SURPLUS LANDS BELONGING TO FLORIDA INLAND NAVIGATION DISTRICT—APPLICABLE LAW PRESCRIBING PROCEDURE

To: *D. Byron King, Attorney, Florida Inland Navigation District, Jacksonville*

QUESTION:

In disposing of land declared surplus by the Florida Inland Navigation District, should the district be affected by the procedure prescribed by section 5, Ch. 65-900, Laws of Florida, or that prescribed by §253.03(1)(g), F. S., as amended by Chs. 67-269 and 67-2236, both Laws of Florida?

It appears from the factual statement in your letter that the Florida Inland Navigation District on Sept. 29, 1967, declared a parcel of land of approximately 8 acres, designated as SMA 690, which is in the city limits of Boca Raton, Palm Beach County, as surplus. Also, the general manager was instructed to follow section 5 of Ch. 65-900, Laws of Florida, in disposing of said surplus property. It also appears that the board of conservation has questioned as to whether or not Ch. 67-269, Laws of Florida, as amended, is applicable in the disposition of the surplus property.

Accordingly, you have requested an opinion as to whether or not Florida Inland Navigation District may dispose of surplus lands as prescribed in section 5, Ch. 65-900, Laws of Florida, or whether the provisions of Ch. 67-269, Laws of Florida, as amended, affects this procedure, and whether Ch. 67-269, Laws of Florida, as amended, is applicable in an action to dispose of property under the provisions of Ch. 65-900.

Chapter 65-900, Laws of Florida, provides, in section 5 thereof, the procedure for the Florida Inland Navigation District to dispose of property which may be declared surplus by the board of commissioners. In Ch. 67-269, Laws of Florida, the legislature prescribed that certain lands owned by the state shall be deemed to be vested in the Trustees of the Internal Improvement Fund for the use and benefit of the state and said law amended §253.03(1)(g), F. S., to exclude certain lands from being vested in the Trustees of the Internal Improvement Fund, but did not specifically name navigation districts. This amendment raised a serious question as to whether or not lands owned by navigation districts were excluded from the provisions of law which provided that all lands owned by state agencies would be vested in the Trustees of the Internal Improvement Fund.

However, Ch. 67-269, Laws of Florida, was again amended by the legislature in the 1967 Extraordinary Session by Ch. 67-2236, Laws of Florida, which amendment further dealt with §253.03(1)(g), F. S., to broaden the exclusions of lands being vested in the Trustees of the Internal Improvement Fund. Paragraph (g) provides as follows:

... All lands which have accrued, or which may hereafter accrue, to the state from any source whatsoever, *excluding lands held for road and canal rights of way or spoil areas or borrow pits, or any land, title to which is vested or may become vested in any port authority, flood control district, water management district or navigation district or agency created by any general or special act.* (Emphasis supplied.)

Accordingly, it would appear that the lands owned by navigation districts are excluded from the state properties vested in the Trustees of the Internal Improvement Fund and the provisions of Ch. 65-900, Laws of Florida, would be applicable to the disposition of any lands declared surplus by the Florida Inland Navigation District by the Commissioners of the Florida Inland Navigation District.

068-68—June 5, 1968

JUVENILE COURTS

AUTHORITY OF JUDGE IN CALHOUN COUNTY TO APPOINT COUNSEL TO REPRESENT INDIGENT CHILD

To: Philip J. Knight, County Prosecuting Attorney, Blountstown

QUESTION:

What authority does the juvenile judge of Calhoun County have with respect to the appointment of counsel for an indigent child brought before him?

Section 27.51(1), F. S., as amended in 1967, reads as follows:

... (1) The public defender shall represent without additional compensation as provided in §909.21, any person who is determined to be insolvent as provided in this act, who is under arrest for, or is charged with, a felony. In any proceeding in a juvenile court in any county of this state having a population in excess of three hundred ninety thousand, according to the latest official decennial census, where a child is alleged to be a delinquent child pursuant to a petition filed therein and the said child is determined to be insolvent, and if such child requests, or the court on its own motion appoints, the public defender or assistant public defenders shall represent said child. In any proceeding in a juvenile court in any remaining county of this state where a child is alleged to be a delinquent child pursuant to a petition filed therein and the said child is determined to be insolvent, and if such child requests, and the court on its own motion appoints, the director of the division of youth services of this state shall appoint counsel to represent said child from the legal department of the division of youth services. *If legal counsel is not available from the division of youth services, the juvenile court may appoint the public defender, assistant public defender or private counsel to represent the alleged delinquent indigent child.* Nothing herein contained shall prevent the trial court from appointing private counsel in capital cases as provided in §909.21. The clerk of the court conducting such proceedings is directed to make such proceedings a matter of record. (Emphasis supplied.)

Insofar as the appointment of counsel by a juvenile court is concerned, the effect of said subsection is to provide that:

(1) The juvenile court of a county having a population in excess of 390,000 is authorized to appoint the public defender or an assistant public defender to represent an allegedly delinquent child who is determined to be insolvent.

(2) The juvenile court of any other county may call upon the director of the division of youth services to appoint counsel from the legal department of said division to represent an allegedly delinquent child who is determined to be insolvent.

(3) If legal counsel is not available from the division of youth services, then the juvenile court of a county having no more than 390,000 population may appoint the public defender or an assistant public defender or private counsel to represent an allegedly delinquent child who is determined to be insolvent.

I am informed that no legal counsel is available from the division of youth services for appointment under said §27.51(1), F. S. Therefore, it is my opinion that, since Calhoun County has a population of less than 390,000, the Juvenile Court of that county may appoint either the public defender or an assistant public defender or private counsel to represent a child charged in that court with being a delinquent child if such child is determined by said court to be insolvent.

068-69—June 6, 1968

WITNESSES

ABSOLUTE PRIVILEGE AND IMMUNITY WHEN TESTIFYING BEFORE LEGISLATIVE COMMITTEE ON ORGANIZED CRIME AND LAW ENFORCEMENT

To: *Senator Robert L. Shevin, Chairman, Select Committee to Investigate Organized Crime and Law Enforcement, Miami*

QUESTION:

Do committee members and witnesses testifying before the select committee to investigate organized crime and law enforcement pursuant to subpoena or request of the committee enjoy an absolute privilege and immunity from the results of their action?

Absolute privilege is defined in 20 Fla. Jur., Libel and Slander §60, in the following language:

A publication is absolutely privileged, when either by reason of the occasion giving rise to it or by reason of the nature of the matter in reference to which it is made, no remedy can be had in a civil action, however hard it may bear on a person who claims to be injured thereby and even though it may have been made maliciously. The class of absolutely privileged publications is narrow and in effect limited to legislative and judicial proceedings and other acts of state.

In *Fiore v. Rogero*, 144 So.2d 99, the court held that testimony given before a legislative body or a committee thereof conducting an authorized investigation is generally subject to the same rules of privilege accorded similar testimony in judicial proceedings.

In *Robertson v. Industrial Ins. Co.*, 75 So.2d 198, the court stated that the reason for the rule of absolute privilege of statements made in judicial proceedings is that all persons connected with the proceedings should be free from fear of being called upon to defend suits

arising as a result of derogatory disclosures. The court further stated that defamatory words published in the course of a judicial proceeding are absolutely privileged, if they are relevant and material to the cause or subject of inquiry and no action for damages will lie therefor.

In Fiore, earlier cited, a witness demanded he be heard by the Florida Legislative Interim Committee on Roads and in the subsequent civil action for utterance of slanderous matter, the court ruled that testimony given before a legislative committee without having been subpoenaed or requested was not absolutely privileged but merely qualifiedly privileged and could therefore be the basis of a cause of action for slander.

I therefore conclude that a committee member or witness subpoenaed or requested to appear before the committee has absolute privilege so long as the testimony is connected with or relevant or material to the cause in hand or subject of inquiry. I further suggest that the record of the hearing reflect the circumstances of the voluntary or required attendance.

068-70—June 6, 1968

PUBLIC FUNDS

AUTHORITY OF COUNTY TO REIMBURSE ATTORNEY FOR DEFENDING CANVASSING BOARD

To: George M. Moody, Clerk of Circuit Court, Flagler County, Bunnell

QUESTION:

May boards of county commissioners reimburse attorneys for defending the canvassing board?

In AGO 054-206, Aug. 24, 1954, p. 137 of the Biennial Report of the Attorney General 1953-1954, dealing with a similar question, it was stated in part:

Public officers in the performance of their official duties should, so far as possible, be protected against fear of reprisal by way of responding in damages. . . . (They) are entitled to some assurance that in the performance of a public service they will not be put to the expense of defending a civil action predicated upon their official acts and report. Therefore, should it be finally determined, in the litigation . . . that the defendants . . . are not civilly liable, I am of the opinion the county may properly pay a reasonable attorney's fee incurred in their defense as such services constitute a county purpose within the meaning of Art. IX, §5, Florida Const. . . .

In *State ex rel., Himes v. Culbreath*, 128 Fla. 210, 174 So. 422, at 423-4, the Supreme Court of Florida said:

. . . The language contained in the grant of that power by the Legislature (*Section 125.01(3), Florida Statutes*) necessarily vests (in) the boards of county commissioners, . . . broad discretionary powers to the end that the interests of the counties in all legal causes and controversies in which they may be involved shall be adequately served.

The prosecution and defense of legal causes must necessarily, under the system of jurisprudence obtaining in this country, be done by legal representatives in the courts pro-

vided by law for the adjudication of controversies. The power carries with it the necessary implication, therefore, that counsel may be employed by the boards of county commissioners whenever in the judgment of such boards the interests of the counties require the services of counsel in the courts, . . . (Emphasis supplied.)

It appears from the above-cited authorities that the board of county commissioners is vested with the power to reimburse counsel for defending county officials acting within the scope of their duties and responsibilities where in the discretion of the commission it is reasonable and necessary to do so in order to adequately represent the interest of the county.

068-71—June 17, 1968

ELECTORS AND ELECTIONS

CONTRIBUTIONS TO POLITICAL CAMPAIGNS AND PURPOSES BY BANKS

To: *Tom Adams, Secretary of State, Tallahassee*

QUESTION:

May a state chartered bank corporation make a contribution to a candidate for public office in light of the provisions of §§99.161(1) and 104.091(1), F. S.?

Section 104.091(1), F. S., previously served to prohibit all corporations and their officers, employees, agents or attorneys from contributing directly or indirectly any money or other thing of value for any political purpose. This section was however amended during the 1967 Session of the Legislature by Ch. 67-164 Laws of Florida, and now provides:

. . . No corporation shall do anything or any act that is prohibited of individuals by the election code. Likewise, any corporation, except one whose principal business is enumerated in §99.161(1), may do any act or thing that an individual may do; provided, however, those individuals and corporations enumerated in §99.161(1) shall not, directly or indirectly, make any payment, loan or exchange of money or other thing of value to any corporation for the purpose of making, directly or indirectly, any political contribution authorized in this section. (Emphasis supplied.)

The individuals and corporations enumerated in §99.161(1), F. S., are those corporations and persons holding permits for horse and dog racing, licenses for the sale of intoxicating beverages and those persons or corporations operating public utilities.

Ostensibly the reason for making it unlawful for the persons and corporations enumerated in §99.161(1), F. S., to contribute to political campaigns stems from the fact that each is an industry which is highly regulated by the government and theoretically contributions to successful candidates might result in the granting of special governmental favors. While the same theory might apply to banks since they are also regulated by the state, the legislature has not seen fit to include them in the list of corporations which are prohibited from contributing to political campaigns.

The rule of "*expressio unius est exclusio alterius*," which means

the expressed mention of one thing implies the exclusion of another, appears applicable here. See *Dobbs v. Sea Isle Hotel*, Fla., 56 So.2d 341; *Alsop v. Pierce*, 155 Fla. 184, 19 So.2d 799; *Ideal Farms Drainage Dist. v. Certain Lands*, 154 Fla. 554, 19 So.2d 234, and *In Re Ratliff's Estate*, 137 Fla. 229, 188 So. 128. Under this rule it would appear that the legislature by failing to classify banks in the list of prohibited corporations in §99.161(1), F. S., did not intend to restrict banks from contributing to political purposes and campaigns as now authorized under the provisions of §104.091, F. S. This section as amended now allows "all corporations" except those mentioned in §99.161, F. S., to make political contributions up to the same limits and in the same manner as private individuals.

Thus in the absence of any state or federal rules or statutes specifically applicable to banks which would serve to prohibit banks from contributing to political campaigns, and there appear to be none, and assuming that banking corporations comply with the restrictions in their charters and bylaws in so doing, they would not appear to be prohibited from making contributions for political purposes and campaigns.

It should be pointed out in passing that the Federal Corrupt Practices Act, 18 U.S.C.A. §§610-11, would apply in federal races so as to preclude candidates for the United States Congress, United States Senate, President or Vice-President from accepting contributions from corporations notwithstanding the provisions of §104.091, F. S., which authorize corporate contributions for political purposes and candidates in this state that do not come within the purview of the Federal Corrupt Practices Act. Accordingly, your question is answered in the affirmative.

068-72—June 17, 1968

CRIMINAL PROCEDURE

INSOLVENCY OF DEFENDANT CHARGED WITH COMMISSION OF FELONY—DETERMINATION

To: *Louis R. Bowen, Jr., Public Defender, Ninth Judicial Circuit, Orlando*

QUESTION:

When a defendant is charged before a justice of the peace, acting as a committing magistrate, with the commission of either a capital or noncapital felony, does such justice of the peace have the authority to determine whether the defendant is insolvent and, if he determines that the defendant is insolvent, order the public defender to represent the defendant in the proceedings before such justice of the peace, even though no charge has been made in the court having jurisdiction to try the offense?

The pertinent part of §27.51(1), F. S., as amended in 1967, provides that:

(1) The public defender shall represent without additional compensation as provided in §909.21, any person who is determined to be insolvent as provided in this act, who is under arrest for, or is charged with, a felony. . . .

The pertinent part of §27.52(1), F. S., states that:

(1) The determination of insolvency of any accused person shall be made by the court and may be done at any stage of the proceedings. . . .

Said quoted provision of §27.51(1), F. S., says that the public defender shall represent any person who is determined to be insolvent as provided in the public defender act, who is under arrest for or charged with a felony. It contemplates that a person charged with any felony, whether capital or noncapital, shall be represented by the public defender if he is determined to be insolvent. It does not require that the charge be made in the court having trial jurisdiction; it also applies if the charge is made before a justice of the peace or other committing magistrate.

The quoted provision of §27.52(1), F. S., is in keeping with the views expressed above. It authorizes "the court" to determine insolvency at any stage of the proceedings. The proceedings have commenced and are pending when a committing magistrate takes an affidavit charging a felony and issues an arrest warrant. When this occurs, the committing magistrate's court is "the court" referred to in said statutory provision; his court is the only court which has jurisdiction at that stage of the proceedings to determine that the felony defendant is insolvent. Therefore, the statutory provision authorizing "the court" to determine insolvency at any stage of the proceedings would be meaningless if the committing magistrate could not make that determination in a felony case pending before him, since no other court could make the determination while the matter is pending only before the committing magistrate. Your question is answered in the affirmative.

068-73—June 17, 1968

INSTITUTIONS OF HIGHER LEARNING

UNIVERSITY REGULATIONS RELATING TO CONDUCT OF STUDENTS—UNIVERSITY PRESIDENT'S AUTHORITY TO MAKE FINAL DETERMINATION OF UNIVERSITY REGULATIONS

To: Robert B. Mautz, Chancellor, State University System of Florida, Tallahassee

STATEMENT OF FACTS:

At the University of Florida there has existed for many years a presidential committee called a Committee on Discipline (now called Committee on Student Conduct) which has been delegated the responsibility for hearing charges of violations of university regulations filed against students. Penalties recommended by the Committee on Student Conduct are subject to the President's approval. On February 8, 1968 certain students at the University of Florida refused to obey an order given by a university official to cease blocking the door to and obstructing the hallway in front of the placement office. Upon such refusal the students were arrested for trespass after warning and found guilty by the municipal court of the City of Gainesville. Subsequently misconduct charges were filed before the Committee on Student Conduct. In essence the students who had been arrested and convicted in the municipal court of Gainesville were charged with the violation of certain sections of the restrictions on student conduct by virtue of the acts for which they were convicted in city court.

Counsel for the students have filed motions and briefs alleging no jurisdiction, double punishment and other legal defenses.

On April 25, 1968 President O'Connell issued a memorandum on the subject of the responsibilities of the Committee on Student Conduct. The memorandum stated the following policies relative to the Committee on Student Conduct:

1. The Committee on Student Conduct is an administrative agency of the University appointed by the President. It can only exercise the authority assigned to it. It is not a court.

2. The function of the Committee is to conduct hearings on charges alleging violation of the Code of Conduct contained in the University Regulations on Student Conduct.

3. Except as may be necessary to determine whether facts alleged in the charge or facts proved constitute a violation of the conduct proscribed by the words in the Code of Conduct, the Committee has no authority to interpret any portion of the University Regulations on Student Conduct, to question the wisdom or justice of the provisions of the Code of Conduct, or to attempt to determine the legislative intent of the drafters of the Regulations.

4. In conducting hearings the Committee shall concern itself only with determining:

a. Whether the complaint charging misconduct is in proper form; adequately informs the student of the misconduct charged; states the section and subsections of the Code of Conduct under which the charge is made, and is signed by a proper person.

b. Whether the rules of the Committee have been observed by the University and/or the student.

c. As to charges alleging violation of Section D, 3 and 4, whether the student committed the misconduct charged against him, i.e., guilt or innocence; as to charges alleging misconduct under Section D, 1. a and b, whether the accused committed the misconduct and also whether the continued presence of the students affects the health, safety or academic reputation of the University Community; as to charges of misconduct under D, 1. c, the Advisory Subcommittee shall first determine if the misconduct charged is flagrant or repetitive and overtly prejudicial to the academic functions or reputation of the University Community and the Committee on Student Conduct shall determine if the student committed the acts alleged.

d. What disciplinary action shall be recommended.

QUESTIONS:

1. Did President O'Connell, in his official capacity, have the authority and duty to define the jurisdictional authority and duties of the Committee on Student Conduct by memorandum such as that issued April 25, 1968; and is this interpretation binding on the committee in its consideration of the charges referred to it?

2. Is the authority and duty of the committee as defined by the president's memorandum reasonable and consistent with that usually exercised by an administrative body, i.e. a presidential committee of a university?

3. Do the limitations placed on the authority of the committee by the president's memorandum of April 25, 1968 violate any of the essentials of due process guaranteed to students

charged with misconduct and appearing before such a committee?

4. Does the president have the authority and duty to make binding interpretations of university regulations; and if he does not, who, other than a court, has such authority?

5. If the president has the authority to make interpretations as those contained in the memorandum of April 25, 1968, are those contained in this memorandum valid and reasonable?

Section 1 of Article II of the Constitution of the University of Florida, which section is consistent with the laws of this state and the policies lawfully adopted by the Board of Regents, reads as follows:

Section 1. THE PRESIDENT—The President shall be the chief executive officer of the University and shall exercise general supervision over all its activities. The President shall be nominated by the Board of Control and appointed by the State Board of Education. Upon the resignation, retirement, or death of the President a special committee of five members elected by the University Senate from the faculty shall be available to the Board of Control for the purpose of consulting in the selection of a nominee for President. He shall have a veto power over all actions of committees, college faculties, the Councils and the University Senate, which power shall be exercised by sending a written executive order to the body concerned. In all matters not otherwise provided for in the Constitution and By-Laws he shall, under the Board of Control, have plenary power.

The president of a university has inherent power to determine factually whether students at the university have been guilty of such conduct as to warrant disciplinary action. Federal courts have recently recognized that administrative due process can be afforded by hearing conducted either by a committee or by an individual duly authorized to conduct a hearing. See *Wright, et al. v. Texas Southern University, et al.*, 277 F. Supp. 110 (1967) and *Esteban, et al. v. Central Missouri State College, et al.*, 277 F. Supp. 649 (1967). Both of these cases interpret the right of administrative due process set forth in *Dixon, et al. v. Alabama State Board of Education, et al.*, 294 F.2d 150 (1961). In the *Esteban* case the court said:

In recent years, and particularly in recent months, there has been considerable judicial activity in this field of students' rights vis-a-vis the rights of university administrators. See for example, *Dickey v. Alabama State Board of Education*, United States District Court for the Middle District of Alabama, Northern Division, 273 F. Supp. 613 (September 8, 1967); *Hammond v. South Carolina State College*, United States District Court for the District of South Carolina, Orangeburg Division, 272 F. Supp. 947 (August 31, 1967); *Due v. Florida Agricultural & Mechanical University*, 233 F. Supp. 396 (D.C. 1963); *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961). It is not disputed that the 14th amendment with its due process clause applies to state educational institutions. The question before this Court is rather, were the plaintiffs entitled to procedural due process before they were suspended, and if so, were they afforded procedural due process? The Court is in accord with those cases referred to above in that it holds the plaintiffs as students at a state college

are entitled to procedural due process before they can be suspended from college. Whether the interest of the student be described as a right or a privilege, the fact remains it is an interest of extremely great value and is deserving of constitutional protection. However, in so holding the Court does not hold that the procedural due process which must be afforded these plaintiffs before they can be validly suspended implies a formal court type judicial hearing such as is required in criminal cases. For as the Dixon case, *supra*, upon which plaintiffs place great reliance, states at 159, "This is not to imply that a full-dress judicial hearing, with right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out." However, implicit in the concept of due process as it concerns these students are the elements of notice and impartial hearing. The students are entitled to know the ground or grounds upon which the college is considering taking disciplinary action, should be afforded an opportunity to appear before the person or persons responsible for taking disciplinary action and make such showing or explanation as they wish to make, and should be advised in some adequate manner of the nature of the evidence against them. The precise nature of the notice and hearing will of course vary depending upon the circumstances of the particular case. From the record in this case it appears that there may have been some uncertainty in the minds of the students as to the ground or grounds upon which the college proposed to take action. The two plaintiffs seem to contend that in their testimony as does their attorney in his brief. A written notice of the precise charge will remedy this situation. . . . It is imperative that the students charged be given an opportunity to present their version of the case and to make such showing as they desire to the person or group of persons who have the authorized responsibility of determining the facts of the case and the nature of action, if any, to be taken.

At the University of Florida the President has approved the establishment of the Committee on Student Conduct as a hearing committee before which matters involving student misconduct may be brought. Question 1 is, therefore, answered in the affirmative.

Question 2 inquires as to whether the duty of the Committee as defined by President O'Connell's letter is reasonable and consistent with that usually exercised by an administrative body such as a presidential committee of a university. I do not have available to me statistics which would show whether this method of handling student disciplinary matters is used in most universities. The hearing element of the administrative due process requirement, however, may be met by the use of a committee with the authority and duty defined by President O'Connell's memorandum. It could likewise be met by the use of a presidentially appointed individual exercising such authority and duty, or even by the President himself conducting the hearing.

Question 3 inquires as to whether the limitations placed on the Committee by President O'Connell's memorandum of April 25 violate any of the essentials of due process guaranteed to students charged with misconduct and appearing before the Committee. I find no violation of such guarantees. I find that the authority and duty imposed

upon the Committee by that memorandum is in accord with those which would normally be presumed to be the duties of such Committee. The Committee is essentially a fact-finding Committee which determines whether or not conduct by a student is violative of any of the rules of the university and, if so, to recommend disciplinary action to be taken.

In this regard it is held that rules condemning student misconduct need not be as explicit as statutes defining crimes. This principle was followed in January 1968 by the United States District Court for the Middle District of Tennessee in the case of *Jones, et al. v. State Board of Education of and for the State of Tennessee, et al.*, 279 F. Supp. 190 (1968). In that case a student at the university was charged with acts exemplifying a disrespect for university authority and with having been arrested and convicted on charges of disorderly conduct. Another student was charged with disrupting fellow students in their pursuit of study with printing, writing and distributing materials of a disrupting nature designed to interfere with orderly university life, with being in bed with a female, with directing disrespectful speech toward university authorities, with being accused of participating in a rock-throwing incident without denying his participation, with participating in a meeting on the university campus of an organization which had been refused recognition by the university and with conduct disrespectful of authorities of the university. A third student was charged with disrupting a meeting between university officials and students, with illegally entering a building at the university for the purpose of conducting a meeting of a student group which had been denied recognition by the university, with distributing literature and soliciting students, all of which was aimed at organizing a boycott of the registration of students for the Fall Quarter, with assaulting the President by calling him names not ordinarily considered proper in discussions between the President of the university and one of his students and with continuously showing disrespect for university authority.

Because of these alleged actions the students were charged with a violation of three university regulations: Those prohibiting (1) disrespect for university authority; (2) any act in violation of city, county, state or federal law; (3) any other infractions of standards of conduct that require severe disciplinary action. The Faculty Advisory Committee found these students guilty of violations of those rules. In Federal Court the students contended that the regulations which they were charged with violating were unconstitutionally vague. In disposing of that attack the court said:

The Court is of the opinion that no constitutional right of the plaintiffs has been infringed because disciplinary action was taken against them pursuant to these three regulations. Plaintiffs have cited several cases to the effect that "a law forbidding or requiring conduct in terms so vague that men of intelligence must necessarily guess at its meaning and differ as to its application violates due process of law." *Baggett v. Bullitt*, 377 U.S. 360, 366-367, 84 S. Ct. 1316, 1320, 2 L.Ed.2d 377 (1964). The Court does not quarrel with this well established rule of law but believes that it is inapposite in this case. The plaintiffs here are not attacking a state statute. Rather, the attack is upon student regulations found in a university handbook. No case is cited to this Court in which an attack upon a student regulation as being unconstitutionally vague has been sustained. To fulfill its function of imparting knowledge, a university must of course maintain order on its campus and exclude there-

from those who are detrimental to its well being. A university has inherent general power to maintain order and to formulate and enforce reasonable rules of student conduct. *Goldberg v. Regents of University of California*, 57 Cal. Rptr. 463 (Cal. App. 1st Dist. 1967). University regulations for students because of the very nature of the institution and its goals and purposes, should not be tested by the same requirements of specificity as are state statutes.

* * * * *

In concluding that the F.A.C. in the exercise of its power to control student conduct and behavior has not deprived the plaintiffs of any constitutionally protected rights, the Court is in no way departing from the rule of *Dixon and Knight* that due process of law requires notice and some opportunity for a hearing before a student at a tax supported university may be expelled for misconduct. While a state school must comply with these elementary principles of procedural fair play, it is not necessary that a university adopt all of the formalities of a court of law. To achieve its educational goals a university must maintain order, propriety, and discipline. It is axiomatic that the exigencies of university life require the formulation and enforcement of rules of student conduct, and a court of law will not interfere with this function when, as is this case, the university has proceeded in a manner that is fundamentally fair and reasonable.

Finding no violation of the essentials of due process encompassed within the limitations imposed by President O'Connell question 3 is answered in the negative.

In answer to question 4 it is obvious that the President of the University has final authority within the university to make binding interpretations of university regulations. In the recent case of *Barker, et al. v. Hardway, et al.*, ____ F. Supp., ____, decided April 10, 1968, the United States District Court for the Southern District of West Virginia held that "[t]he power of the president of the college to oversee, to formulate rules and regulations, and to rule is a necessary element in order to provide and promote education." (Emphasis supplied.)

Incidentally, Judge Sidney L. Christie, in his opinion in *Barker, supra*, made the following statement relative to student behavior:

True it is that enrollment in school does not mean the student surrenders any of his constitutional rights. But by the same token, that fact does not give him the right to abuse and harass the administrators of the institution or engage in conduct detrimental to its well-being or which may tend to deprive other students of the right to a peaceful atmosphere in which to pursue their ambition for an education. . . . I have failed to find any case saying that the right of free speech and peaceful assembly carries with it the right to verbally abuse another or to threaten him with physical harm or to deprive him of his right to enjoy his lawful pursuits.

This statement of law may be taken by each student in Florida as directive of the type of conduct expected of him and informative of the type of conduct he may expect from his fellow students.

Feeling strongly as I do that the President has the final authority

within the University to make interpretations of the university regulations, I must respectfully decline to answer question 5 because I feel that my opinion as to the validity or reasonableness of the president's interpretation of the rule would be meaningless. Only a court of competent jurisdiction should attempt an expression in this regard.

068-74—June 19, 1968

TAXATION

CLASS "C" INTANGIBLE—MORTGAGES ASSUMED FROM ORIGINAL MORTGAGE OBLIGOR WHERE TAX PAID ON ORIGINAL MORTGAGE

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

Is additional Class C intangible tax due on mortgages which are assumed from the original mortgage obligor, where Class C intangible tax had been paid on the original mortgage?

Your question is answered in the negative.

Your question contemplates a construction of the proviso in §1, Art. IX, State Const., which states:

. . . [P]rovided, that as to any obligations secured by mortgage, deed of trust, or other lien, the Legislature may prescribe an intangible tax of not more than two (2) mills on the dollar, which shall be payable at the time such mortgage, deed of trust, or other lien is presented for recordation, said tax to be in lieu of all other intangible assessments on such obligations. . . (Emphasis supplied.)

Said proviso was construed in the case of *State v. Dickinson, Fla.*, 193 So.2d 607. Therein at p. 609 the Court stated:

. . . The intention of the Legislature which submitted the amendment containing said proviso was that the proviso authorized a single tax imposed only once upon said obligations when the mortgages, deeds of trust or other liens securing them were presented for recordation. The tax was to be collected by our tax officials at the time such lien instruments were presented for recordation in the offices of the clerks of the circuit courts of the several counties in the State of Florida. . . (Emphasis supplied.)

At p. 610, the Court stated: "No doubt the purpose of the 1943 Legislature submitting said proviso in the amendment was to give a 'tax break' to those executing and recording liens in Florida as an incentive to encourage investments having impact in the state . . ."

In distinguishing certain of the relator's cases, the Court remarked: ". . . This case leaves the distinct impression that if such agreements for deed are presented for recordation the 'one-time tax (Class C) and in lieu of all others' applies. . ." (Emphasis supplied.)

The file submitted with your letter seems to deal solely with property situated in Florida, as opposed to property situated in other states. For this reason, the C-2 intangible tax is not dealt with in this letter. This letter is limited to the Class C-1 tax.

The Class C-1 intangible tax is collectible only once, that time

being when the instrument is recorded in Florida. Thus, when the mortgage is assumed, no additional tax imposition arises since the "one-time tax" has already been paid.

I would emphasize here that we are dealing with an intangible tax under §1, Art. IX, State Const., not a documentary stamp tax under Ch. 201, F. S. This distinction is important since the rules pertaining to each imposition are completely different. The fact that an additional obligation arises upon the assumption of mortgage is of import when determining documentary stamp tax liability, but is not the determinative criterion when determining intangible tax liability.

For example, a bank or other financing institution holding the mortgage as mortgagee has only the one regardless of the number of endorsers or additional obligors on the mortgage. These additional obligors merely provide additional security not different or additional intangibles.

Section 199.141(3), F. S., has been examined. Said section should be construed in light of the controlling constitutional provision and in case of conflict the constitution prevails. In this respect I refer you to the case of *State v. Dickinson, Fla.*, 188 So.2d 781. In said case it is stated at pp. 783 and 784:

Thus, when the above cited rule is applied herein, we find that the provisions of the Constitution must control over the conflicting language found in the statute. The language appearing as a part of the organic law is clear and explicit; it requires the tax to be paid *at the time the instrument is presented for recordation*, and the statutory language rendering the tax due and payable when the instrument is executed *must give way*. . . . The court in *Jasper v. Orange Lake Homes, Inc., Fla.App.*, 151 So.2d 331, in affirming the finding of the lower court that agreements for deed held by the seller were taxable *only* as class C intangible personal property, as defined in F.S. §199.02(3), F.S.A., concluded that such agreements, providing for conveyance of realty upon payment of the purchase price and for termination of the agreement and forfeiture in the event of default, constituted obligations for payment of money secured by lien on realty, *taxable only once* as class C intangible personal property, *although alternative remedies were available to the vendor in the event of breach of the contract by the purchaser*, the court remarking, at page 333, "At any rate, the Constitution limits the levy of the tax on any obligation secured by mortgage, deed of trust or other lien to the *one-time tax* (Class 'C'), and in lieu of all others. The statutory language cannot be used to broaden the constitutional limitation. The vendor's liens arise by virtue of the agreements for deed. . . ." It is a matter of common knowledge, of which this court can take judicial notice, that the Class C tax is exacted by our tax gatherers *only* at the time the mortgage, or other security, is presented for recordation, or for enforcement in our courts; and that, *once this tax has been collected on a particular secured obligation, no further annual tax is collected by the tax collectors of this state on such obligation*. . . . It may be seen, therefore, that in its practical operation, the Class C tax is exacted only if the owner of the secured obligation elects to record his security or to enforce it in our courts. (Emphasis supplied.)

In Justice Ervin's dissent the tax is referred to as a single tax.

The conclusion reached herein is consistent with the language of §199.141(3), F. S., and particularly the following language:

. . . No mortgage, deed of trust or written evidence of a specific lien in the nature of a mortgage on real property *shall be admissible to record* or be recorded in any public record of this state or be enforceable in any court of this state unless *and until the tax levied by this subsection shall have been paid and until the notation of the tax collector shall have been placed thereon showing the payment of the tax*, except where such tax is collected and notation made by the clerk of the circuit court as hereinafter provided. The Class C intangible tax may be paid to the clerk of the circuit court *at the time the mortgage, deed of trust or lien securing such indebtedness is presented for recordation*. . . (Emphasis supplied.)

I would also refer you to §199.141(3)(c), F. S., which states in part:

Any mortgage, deed of trust or other lien given to replace a defective mortgage, deed of trust or other lien, *covering the identical real property as the original, and securing the identical original note or obligation*, shall be recorded *without* payment of additional tax upon proof of payment of the tax upon the original recording. The tax collector or clerk shall place a notation on the new mortgage, deed of trust, or other lien, showing that the tax has been paid on the original recording. (Emphasis supplied.)

This evinces the legislative intent of making the tax referred to herein a "one-time tax" regardless of the number of assumptions. Also see AGO 064-60, May 13, 1964, Biennial Report of the Attorney General, 1963-1964.

068-75—June 19, 1968

STATE PURCHASING

FLORIDA STATE TURNPIKE AUTHORITY, STATE AGENCY— SUBJECT TO REGULATIONS OF PURCHASING COMMISSION, EXCEPTIONS

To: Al J. Day, Executive Director, State Purchasing Commission,
Tallahassee

QUESTIONS:

1. Is the Florida State Turnpike Authority an agency of the state as defined in §287.011(1), F. S.?

2. Is the Florida State Turnpike Authority subject to the provisions of §287.061(5), F. S. or is such section superseded by or in conflict with §340.06(13), F. S.?

AS TO QUESTION 1:

It is clear the Florida State Turnpike Authority is an agency of the state and within the purview of Ch. 287, F. S. In addition to the fact that §340.05, F. S., expressly creates the Florida State Turnpike Authority as a state agency, it was specifically held a state agency in *Spangler v. Florida Turnpike Authority*, 106 So.2d 421. As such, the

Florida State Turnpike Authority clearly falls within the purview of §287.011(1), F. S. It is also worth noting that each subsection of §287.061, F. S., refers in an all-inclusive, comprehensive manner to all state agencies.

AS TO QUESTION 2:

It is clear that Ch. 287, F. S., applies to the exercise of power and authority by the Florida State Turnpike Authority pursuant to Ch. 340, F. S., except where an express exception occurs in Ch. 340, F. S. In view of the fact that there appears no such express exception and in view of the fact that §287.061(5), F. S., was enacted subsequent to §340.06(13), F. S., it is my opinion the Florida State Turnpike Authority is subject to the provisions of §287.061(5), F. S.

Although I do not have enough facts upon which to resolve the issue, I call your attention to the question of whether the Florida State Turnpike Authority has the power to purchase pursuit vehicles in the first place. In AGO 056-276, Biennial Report of the Attorney General, 1955-1956, p. 836, a copy of which is attached, this office advised the department of public safety that the turnpike authority did not have the power to pay salaries and expenses of highway patrol troopers directly, but may by the express terms of §340.23, F. S., reimburse the highway patrol for costs incurred incident to turnpike patrol work. Thus the question arises as to whether, assuming the pursuit automobiles are for use by highway patrol officers, these vehicles would constitute expenses incurred by the highway patrol, no different from troopers' handcuffs, uniforms, etc., and thus directly purchasable only by the Florida Highway Patrol pursuant to §321.02, F. S.

068-76—June 20, 1968

COUNTY PUBLIC FUNDS

EXPENDITURE OF TAX MONEYS PURSUANT TO CH. 61-1909, LAWS OF FLORIDA—BREVARD COUNTY

To: *M. D. Cunningham, Administrative Coordinator, Board of County Commissioners, Brevard County, Titusville*

QUESTION:

Is the board of county commissioners authorized to spend tax moneys levied pursuant to special act, Ch. 61-1909, Laws of Florida, for any recreational purpose?

Apparently you place emphasis on the language "any recreational purpose."

In order to answer your question we must analyze Ch. 61-1909, Laws of Florida, to determine the powers granted to Brevard County or any county commissioners district of said county by the legislature, insofar as said powers are related to the expenditure of tax moneys.

You do not set forth any particular purpose. Therefore, this answer cannot be considered as referring to any particular purpose.

The title to Ch. 61-1909, Laws of Florida, states:

AN ACT relating to Brevard County; authorizing said County or any County Commissioners district of said County to establish and maintain county or district recreational areas and facilities; fixing the powers of the Board of County Commis-

sioners of said County in relation thereto; empowering said Board of County Commissioners to levy a tax not to exceed one-half ($\frac{1}{2}$) mill and to issue bonds; providing for a referendum. (Emphasis supplied.)

Section 1 of Ch. 61-1909, Laws of Florida, states:

Brevard county is hereby *authorized to establish and maintain county recreational areas* and facilities within said county or said county *is authorized to establish and maintain district recreational areas and facilities* which district recreational areas and facilities shall be within any commissioners district in said county. (Emphasis supplied.)

Note that the authorization extends to both the establishment and the maintenance of recreational facilities. The fact that the Legislature contemplated both the setting up and the operation of the recreational facilities is further emphasized in section 2, Ch. 61-1909, Laws of Florida, which states:

In order to effectuate the purpose of this act, the board of county commissioners of Brevard county, *is authorized to set up and adopt a plan or system by which said county or district recreational areas and facilities shall be governed, operated and controlled.* (Emphasis supplied.)

Section 3, Ch. 61-1909, Laws of Florida, allows for the assessing of a tax. Said section provides:

In order to improve the recreational areas, construct the facilities and secure the equipment necessary to carry out the intent and purpose of this act, the board of county commissioners operating under the provisions of this act, may assess a tax not to exceed one-half ($\frac{1}{2}$) mill on all the taxable property of said county, or said board of county commissioners is authorized to levy a tax on all the taxable property in the district not to exceed one-half ($\frac{1}{2}$) mill provided said county should choose to operate hereunder, by establishing district recreational areas and facilities in lieu of county recreational areas and facilities. (Emphasis supplied.)

This section seems expressly limited to the levying of a tax for the improving of recreational areas, construction of facilities and the securing of the equipment necessary to carry out the intent and purpose of the act. There is no general expressed power to tax for the operation or maintenance of said recreational areas and facilities. Recreational areas and facilities are defined in section 5, Ch. 61-1909, Laws of Florida. Note that section 5 does not refer to the operation or maintenance of recreational areas or facilities. Had the legislature intended to authorize the assessing of a tax for the operation and maintenance of such areas or facilities it could have easily done so. I am not inclined to extend the expenditure of public moneys to matters not expressly contemplated by the legislature.

I would further point out that this was a special act which became effective only upon approval by the electors in a referendum election. These same electors certainly have a right to be expressly advised for what purposes the tax authorized may be expended.

In the case of *Oven v. Ausley*, 143 So. 588, it is stated at pp. 589 and 590:

In the first place, it is a violation of an elemental principle in the administration of public funds for those who are charged with the trust of their proper expenditure not to apply such funds to the purposes for which they are raised. *When funds are raised by taxation for one purpose they cannot be diverted to some other purpose without legislative authority. . . .* When an enforced contribution is exacted from the people by the power of taxation, *it is for a specific public purpose, and the fund so raised is a trust fund in the hands of the legal custodians of it.* There may exist circumstances in which the fund may be diverted to some other lawful purpose than that for which it was raised. Appropriation of public moneys for certain public purposes involves the power of taxation, and when the money is taken from a fund created by the levy of a tax and applied to some other purpose it is equivalent to the levy of a tax for such purpose. . . . It is evident from the allegations of the bill that more money was appropriated for the particular purpose than was necessary. *If that surplus may now be taken and applied to another purpose for which no tax was authorized, it is obvious that the law thus evaded affords no protection whatever to taxpayers. . . .* (Emphasis supplied.)

I also refer you to the case of *Hyde v. Melson*, 55 So. 79.

Expenditures of moneys are and should be closely scrutinized. To emphasize the gravity of a possible unauthorized expenditure we refer you to 67 C.J.S., at pp. 408-410 wherein it is stated:

Where public moneys or property come into the hands of a public officer by virtue of his office, he is considered a trustee, a bailee, or an insurer of such funds or property. *It is the policy of the law to hold an official custodian of public funds to strict accountability. . . .* Duty to pay after mistake. A mistake of law will not excuse a public officer from paying out public funds when he is dealing with other public officers. . . . (Emphasis supplied.) Any public officer who wrongfully withholds or misappropriates public funds, or who pays or authorizes the illegal payment of public funds, is personally liable for such misappropriation or illegal payment. . . . Where an expenditure is made by a public officer without authority of law, it has been held that the reasonableness, practicability, or expediency of such expenditure is not justification. . . .

Therefore, I hold that the expenditure of the moneys realized from the tax imposition is limited to those purposes expressly enumerated in the act, of which the voters were expressly aware at the time of their approval vote in the referendum election.

068-77—June 20, 1968

PUBLIC PRINTING

COMPETITIVE BIDDING—SPECIFICATIONS, COMMODITIES BY BRAND NAME

To: Al J. Day, Executive Director, State Purchasing Commission,
Tallahassee

STATEMENT OF FACTS:

Some state agencies have executed contracts for Class B printing

based on bid specifications that require, as part of the overall printing job, a specific brand of paper.

In some circumstances only a particular brand of paper may have the characteristics required by the agency.

Even where a particular brand of paper is specified, competitive bidding on the entire job is possible because the specified paper is available to more than one Florida firm.

Based on the above facts, the following questions, which enlarge the issue from "printing" to "commodities" in general, are presented.

QUESTIONS:

1. Do bid specifications which call for competitive bidding on a given commodity, but require that commodity to include components specified by brand name alone, comply with the competitive bidding laws of Florida?

2. Provided reply to the foregoing question is in the negative, are purchases of the commodity, "printing," when restricted to manufacture embracing the use of one particular brand of the commodity, "paper," subject to justification by the state agency and approval by the State Purchasing Commission, in accordance with the provisions of §287.081(2), F. S.?

Because these questions reach to the heart of our competitive bidding system, I am undertaking a review and restatement of applicable principles to guide you in this area.

Section 283.10, F. S., specifically requires Class B printing be let to the: "... lowest responsible bidder who shall manufacture the same within the state."

Under the provisions of §§287.011(2) and 287.081, F. S., Class B printing is also defined as a commodity within the purview of Ch. 287, F. S., regulating purchasing by state agencies in general and requiring certain purchases of commodities be made "by competitive bids received."

As will be discussed below, there may be a material variance between the competitive bidding requirements imposed on state agencies by Chs. 283 and 287, F. S. and the competitive bidding requirements imposed on various counties by §125.08, F. S.

However, insofar as the general requirements of interpreting the meaning of "lowest responsible bidder" and "by competitive bids received" are concerned, the courts have treated these phrases, and the responsibilities they entail, interchangeably. *Wester v. Belote*, 103 Fla. 976, 138 So. 721; *Eggart v. Westmark*, 45 So.2d 505; *Mayes Printing Co. v. Flowers*, 154 So.2d 859; *Robinson's Inc. v. Short*, 146 So.2d 108.

Based on the above cases and a close review of the statutes and preceding Attorney General's Opinions interpreting them, I suggest the following guidelines should apply to state agencies in the purchase of all commodities within the purview of §287.081, F. S.

- (1) Competitive bidding is required in purchases exceeding \$1,000 unless: (a) An emergency is certified by the agency; (b) The item falls within maximum price regulations promulgated by the purchasing commission; (c) The commodity is a "noncompetitive item available from one source only," within the meaning of §287.081(2), F. S., and must be certified by the State Purchasing Commission. Point (1)(c) includes all purchases where an agency specifies a commodity by brand name alone. (A specification of a brand name or its equivalent does not fall within the purview of Point (1)(c) above, in my opinion, be-

cause this is simply a shorthand method of prescribing a set of design characteristics, and pursuant to such a specification, any supplier would be entitled to bid his product. Where the design characteristics of the brand name commodity are not openly ascertainable or available, the agency should make them available to all interested bidders.) Point (1)(c) above would not require certification of a specification drawn in such a manner that only one commodity will meet the specification, whether because the commodity that meets the specification is patented or for any other reason. I add to this the very strong warning, based on the Wester and Mayes cases, *supra*, that specifications must be written to meet genuine needs and standards, and not simply designed to exclude bidders. Therefore, arbitrary or capricious specifications are not acceptable.

(2) I see no reason to distinguish the specification of brand names as components of a given commodity from the above principles which apply to the total commodity since such an exception may result in a decreased opportunity for competition. As the Wester case, *supra*, states: "laws of this kind requiring contracts to be let to the lowest bidder are based upon public economy, and are of great importance to the taxpayers, and ought not to be frittered away by exceptions."

I am aware that *Hinds v. Knight*, 59 So.2d 634, may be cited for the proposition that competitive bidding statutes do not apply where the commodity sought to be purchased is available from only one source. In my opinion, however, this case does not apply to the instant situation.

The *Hinds* case and *Taylor v. County Board of Arlington County*, 189 Va. 472, 53 S.E.2d 34, 77 A.L.R. 702, upon which *Hinds* rests, involved the interpretation of statutes which did not, on their face, appear to allow the purchaser to specify a commodity even where the commodity was clearly superior to all others on the market. The courts did not want to create the paradox of a government purchaser being unable to purchase the best and most economical commodity simply because it was patented. However, such is not the case with the competitive bidding law that applies to state agencies. Here, the legislature clearly provided the certification procedure of §287.081(2), F. S., as a means of allowing the state to acquire a clearly superior commodity, subject to a review intended to avoid abuses of this power. Accordingly, it should be clearly understood this opinion does not apply to competitive purchasing by other than state agencies.

As to question 1, where an agency specifies a component by brand name alone, such specification must be certified by the State Purchasing Commission.

As to question 2, purchases of Class B printing, when restricted to manufacture requiring the use of a particular brand of paper specified by brand name alone, must be certified pursuant to §287.081(2), F. S. In summary, an agency desiring to acquire a particular type of equipment has the following options:

1. It can draw specifications which require the desirable elements needed;
2. It can specify the equipment by brand name or equivalent, and allow bidding of commodities of allegedly equal quality;
3. It can specify the commodity or component by brand name alone, and request that same be certified by the State Purchasing Commission.

068-78—June 24, 1968

COURTS

BROWARD COUNTY COURT OF RECORD CREATED BY CH. 59-877, LAWS OF FLORIDA, ASSIGNMENT OF ASSISTANT COUNTY SOLICITOR TO JUVENILE COURT UNAUTHORIZED

To: *Angeline G. Weir, County Solicitor, Broward County, Fort Lauderdale*

QUESTIONS:

1. May the county solicitor of Broward County assign a full-time assistant county solicitor to the Juvenile Court of Broward County and be responsible for his compensation pursuant to the authority of section 7, Ch. 59-877, Laws of Florida?

2. If answer to question 1 is in the negative, may the county solicitor assign an assistant solicitor to represent the state in said juvenile court upon request of the judge?

Section 7 of Ch. 59-877, Laws of Florida, which created the Court of Record of Broward County, provides that "There shall be a prosecuting attorney for the court to be designated the 'County Solicitor'; and section 9 of the same chapter authorizes the county solicitor to appoint assistant county solicitors and provides that they "shall have the same powers and perform the same duties as the County Solicitor appointing them."

These 2 statutory provisions authorize the county solicitor and his assistants to do no more than perform the duties of prosecuting attorney in the said court of record. They provide no authority for any of them to perform any function in the juvenile court. Therefore, question 1 is answered in the negative.

Question 2 is also answered in the negative. Said Ch. 59-877, Laws of Florida, provides for a county solicitor and assistant county solicitors to serve the court of record, not the juvenile court, and I find no law which would authorize any of them to work in the juvenile court. The fact that a juvenile judge might request that an assistant county solicitor be assigned to the juvenile court would furnish no authorization for such to be done.

068-79—June 25, 1968

GOVERNOR

POWER OF SUSPENSION—MEMBERS OF MUNICIPAL UTILITY BOARD UNAUTHORIZED

To: *Claude R. Kirk, Jr., Governor, Tallahassee*

QUESTION:

Are members of the Utility Board of the City of Key West, created pursuant to Ch. 23373, Laws of Florida, 1945, as amended by Ch. 65-1770, Laws of Florida, "officers" liable for suspension under §15, Art. IV, State Constitution?

Section 15, Art. IV, of the State Const., empowers the governor to suspend "from office" for certain specified reasons only, all "officers that shall have been appointed or elected, and that are not liable to impeachment, . . ."

The Supreme Court of Florida has, with a view to the sweep of §15, Art. IV, State Const., determined that municipal officers are neither state nor county officers within the ambit of the constitutional provision, *In re* Opinion of the Justices, 163 So. 410, and are "subject to removal only in the manner and by the authority determined by the legislature." *Nelson v. Lindsey*, 10 So.2d 131, 134. Under §15 of Art. IV, State Const., only state or county officers or statutory district officers that shall have been appointed or elected and that are not liable to impeachment, are subject to suspension by the Governor. *In re* Opinion of the Justices, *supra*, at 411.

There remains for determination, therefore, whether the members of the Utility Board of the City of Key West are officers, and whether they are municipal or county, state or statutory district officers at that.

Clearly, members of the Utility Board of the City of Key West are, by virtue of the tenure, compensation, high duties and trust vouchsafed them by Ch. 65-1770, Laws of Florida, public officers. 26 Fla. Jur., Public Officers, §§2, 13, 20, and the cases cited therein.

Finally, then, it must be determined whether the board members are municipal officers, not liable to gubernatorial suspension, or are county, statutory district or state officers susceptible to such suspension.

Section 1, Ch. 65-1770, Laws of Florida, declares the Utility Board of the City of Key West to be the successor to the utility board created by Ch. 23373, Laws of Florida, 1945. The 1945 enactment established a board consisting of the Mayor of Key West, 1 member of the Key West municipal governing body, and 3 other "citizens of the City" appointed by the mayor or, failing that, by the governing body. The purposes of the utility board, as witnessed by the act's first whereas clause and by section 9, were patently municipal. The 1965 enactment empaneled a board consisting of the Mayor of Key West and 4 other members. Section 5 of this act insists that at the time of their appointment to the board (by co-option, according to section 3) and thereafter, members must be "home owners residing therein within the City limits of the City of Key West and shall be bona fide electors, freeholders and taxpayers" of the City of Key West. Moreover, the Board is authorized by section 8 of the 1965 act to exercise the power of eminent domain "in the name of the City of Key West, Florida, a municipal corporation" (It should be noted that section 5 of Ch. 65-1770, Laws of Florida, provides the means of removal from the Board of a citizen member: majority vote of the citizen members.)

The powers of these municipal officers to perform municipal duties is neither minimized nor vitiated by the 1965 act. See *Saunders v. City of Jacksonville*, 25 So.2d 648.

Members of the Utility Board of the City of Key West are municipal officers, and as such are not liable to gubernatorial suspension under §15, Art. IV, of the State Const.

068-80—June 25, 1968

CONSOLIDATED GOVERNMENT OF THE CITY OF JACKSONVILLE OFFICE OF CLERK OF MUNICIPAL COURTS—POWERS AND DUTIES; FUNDING

To: *S. Morgan Slaughter, Clerk, Circuit Court, Duval County, Jacksonville*

QUESTIONS:

1. What is the function of the clerk's office with respect to

the Municipal Court of the consolidated government of the City of Jacksonville, particularly relating to:

- a. The Clerk's duties with respect to collection of parking meter fines, and
- b. Whether a criminal docket needs to be kept and "applicable fees charged" with regard to parking meter fines?
2. How should the clerk dispose of "surplus funds"?
3. What is the civil service status of present employees of the office as of the effective date of the charter, and the civil service status of persons employed after the charter's effective date?
4. How will the clerk's office be funded?
5. Is the clerk required to submit a budget to the new city council?

AS TO QUESTION 1:

Article 13, §13.207 (Ch. 67-1320, Laws of Florida), of the Charter, City of Jacksonville, provides:

The clerk of the circuit court having jurisdiction in Duval County shall serve as the clerk of the municipal court. The duties of the clerk shall include the keeping of the docket . . . of the municipal court . . . collection of fines, and such other duties as may be prescribed by ordinance. (Emphasis supplied.)

No requirement for the maintenance of a criminal docket relative to parking meter fines is apparent among the duties now imposed upon the clerk. Otherwise, the clerk will apparently continue to charge applicable fees by virtue of his continued subjection to general and special legislation treating of Circuit Court Clerk, Art. 13, §13.108 of said chapter of the Charter, City of Jacksonville, and subject to such ordinances as the council might enact.

AS TO QUESTION 2:

Article 13, §13.108 of said chapter of the Charter declares the aforementioned continuing subjection of the clerk to applicable general and special laws, one of which is §145.12, F. S., which directs the clerks to pay surplus funds into a special fund to be created by the board of county commissioners.

Although the charter does not specifically describe the procedures to be followed by the clerk of the circuit court and municipal court in disposing of surplus funds in light of the nonexistence of a board of county commissioners, we should look to and be guided by Art. 13, §13.103 of said chapter of the Charter. Therein, the clerks, *inter alia*, of virtually all other courts operative in Duval County are directed to pay to the chief collection officer all accounts formerly payable to the board of county commissioners. The rationale of this section is appropriate to the clerk of the circuit court and municipal court, and in the absence of any other rule, law or ordinance, appears to be the controlling option.

AS TO QUESTION 3:

Upon the effective date of the new charter, civil service status of these continuing employees will be protected by operation of Charter Art. 22, §22.08 of said chapter (which transfigures said employees into employees of the consolidated government) and Art. 19, §19.05 of said chapter (which extends to all employees of the new government protection of the consolidated government's civil service).

Persons employed by your office after the effective date of the

charter will likewise be protected by the civil service system of the new consolidated government by operation of Art. 19, §19.05 of said chapter of the Charter, which embraces all employees of the consolidated government with noted exceptions. Just as your continuing employees have heretofore been considered Duval County employees and prospective consolidated government employees for civil service purposes, so too will new employees share that designation after Oct. 1, 1968.

AS TO QUESTION 4:

The charter effects no obvious change in the method of funding the clerk's office. Indeed, Art. 13, §13.108 of said chapter of the Charter, as noted earlier, expressly declares the continued subjection of the clerk to applicable general and special laws such as Ch. 145, F. S.

AS TO QUESTION 5:

The charter is conspicuously silent on this matter, except insofar as Art. 13, §13.101 of said chapter provides for continuation of the circuit court and its continuing subjection to all applicable general and special laws except as might be "expressly" provided to the contrary by the charter. The charter goes on, however, in Art. 13, §13.108 merely to express the circuit court clerk's continued subjection to applicable special and general laws, thereby implying the continued applicability to the clerk of §145.12, F. S. Any accounting of funds by such reports as contemplated by §145.12, F. S., would now be made to the consolidated government, given the prospective nonexistence of the Duval Board of County Commissioners.

Yet, the clerk of the circuit court has been subject all along to the Budget Commission of Duval County, Ch. 14678, Laws of Florida, 1931, and the new charter does empower the director of finance to obtain budgetary information from each officer, *inter alia*, of the consolidated government, Art. 15, §15.02 of said chapter of the Charter, City of Jacksonville—said government being the successor to the government of Duval County, Art. 1, §1.01 of said chapter of the Charter, City of Jacksonville, and the clerk having been a county officer by operation of §6(7), Art. V, State Const.

In fine, there appears a "gap" in the charter with respect to the clerk of the circuit court; for although arguments are musterable in support of his subjection to or freedom from the budgetary design of the consolidated government, the charter itself does not dispositively speak to the issue. I trust the foregoing treatment of the questions in light of the new and judicially unconstrued charter will prove helpful.

068-81—June 26, 1968

OCCUPATIONAL LICENSE TAXES

LESSORS OF APARTMENTS—REFUNDS OF TAX PAID PRIOR TO AMENDMENT OF §205.251, F. S. BY CH. 68-31, LAWS OF FLORIDA

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

Is a person who procured a license to rent apartments for the year 1967-1968, pursuant to §205.251, F. S. (Ch. 67-433, Laws of Florida), entitled to a refund of the amount paid for such license in that Ch. 68-31, Laws of Florida, specifically excepts such persons from being licensed?

Section 205.251(1), F. S., as enacted by the 1967 Legislature as Ch. 67-433, Laws of Florida, provides as follows:

... Every person engaged in the business of renting accommodations, as defined in chapter 509, shall pay for each place of business an amount of 75¢ for each room; provided, however, that no such establishment shall pay less than \$7.50 for said license. The room count to be used in this section shall be the same as used by the hotel and restaurant commission in §509.251.

This law became effective Oct. 1, 1967. Therefore, on Oct. 1, 1967, every person who was engaged in the business of renting accommodations was required to pay for each place of business an amount of 75¢ for each room; provided, however, that no establishment shall pay less than \$7.50 for its license.

The 1968 Legislative Session enacted Ch. 68-31, Laws of Florida, which amended §205.251(1), F. S., as follows:

... Every person engaged in the business of renting accommodations, as defined in chapter 509, *except apartment houses*, shall pay for each place of business an amount of 75¢ for each room; provided, however, that no such establishment shall pay less than \$7.50 for said license. The room count to be used in this section shall be the same as used by the hotel and restaurant commission in §509.251. (Emphasis supplied.)

Chapter 68-31, Laws of Florida, was filed in the office of the Secretary of State and became a law on Mar. 8, 1968. This law had effect of excepting apartment houses from the payment of an occupational license tax as provided for in §205.251(1), F. S., enacted by Ch. 67-433, Laws of Florida.

Section 215.26, F. S., entitled "Repayment of funds paid into state treasury through error, etc.," specifically provides that:

... The comptroller of the state may refund to the person who paid same, or his heirs, personal representatives or assigns, any moneys paid into the state treasury which constitute:

- (a) An overpayment of any tax, license or account due;
- (b) A payment where no tax, license or account is due;

and

- (c) Any payment made into the state treasury in error; ...

It would, therefore, appear that any occupational license tax paid for the operation of an apartment house subsequent to Oct. 1, 1967, and prior to Mar. 8, 1968, does not come within the provisions of §215.26, F. S., and the Comptroller of Florida would not be authorized to issue any refund unless there is an overpayment in the amount of the tax as called for in the provisions of §205.251(1), F. S., enacted as Ch. 67-433, Laws of Florida. Your question is answered in the negative.

068-82—July 1, 1968

CONSERVATION

CRAWFISH—CONSTRUCTION OF SUBSECTIONS (4) AND (5) OF §370.14, F. S., AS THEY RELATE TO TAKING OF SPECIFIC SPECIES DURING CLOSED SEASON

To: Tom Adams, Secretary of State, Tallahassee

QUESTION:

Does the proposed rule of the State Board of Conservation which authorizes the landing of crawfish, nonegg-bearing females of the species *panulirus argus*, caught in international waters in Florida ports during the closed season without a certified invoice from a foreign country violate the provisions of subsections (4) and (5) of §370.14, F. S.?

The controlling provisions of law found in §370.14(4) and (5), F. S., entitled "Crawfish; regulation" are as follows:

(4) CLOSED SEASON.—No person, firm, or corporation shall take or have in his possession, regardless of where taken, any salt water crawfish (spiny lobster or crayfish) of the species *panulirus argus*, between March 31 and August 1, of each year, except as provided by §370.141, for storage and distribution of inventory stocks.

(5) CARRIERS.—No common carrier or employee of said carrier may carry or knowingly receive for carriage or permit the carriage of any crawfish of the species *panulirus argus*, regardless of where taken, between March 31 and August 1, of each year, except of the species *panulirus argus* lawfully imported from a foreign country for reshipment outside of the territorial limits of the state; but in no case will such shipment be permitted to pass through the territorial limits of the state unless accompanied by certified invoice and the crawfish must be immediately shipped out of the state from the port of entry and may not be processed or repackaged in any manner while in Florida.

It appears from the foregoing quoted subsections from §370.14, F. S., that no person, firm or corporation shall take or have in his possession regardless of where taken any salt water crawfish of the subject species between the dates of March 31 and August 1, of each year, with 2 exceptions provided for by the legislature. The first exception is contained in §370.14(4), F. S., which provides for storage and distribution of inventory stocks of crawfish taken during the open season. The second exception is found in §370.14(5), F. S., which allows for a shipment of crawfish to be permitted to pass through the territorial limits of the state of the named species of crawfish lawfully imported from a foreign country for reshipment outside of the territorial limits of the state. No other exception has been provided by the legislature to the all-inclusive no possession aspect between the dates of March 31 and August 1 of each year. If it had been the legislative intent to provide for further exceptions, then the legislature would have done so. I can find none in the statute under consideration.

In view of the foregoing, it is my opinion that if this board would pass a regulation broadening the 2 exceptions found in subsections (4)

and (5) of the no possession provisions of §370.14, F. S., then there would be a conflict between the proposed regulation and the statute involved in this matter. Where a conflict occurs between a statute and administrative regulation promulgated thereto, the statute must control. *Nicholas v. Wainwright*, 152 So.2d 458; *Collins v. Horten*, (D.C.A., 1st Dist., 1959) 111 So.2d 746.

Accordingly, it is my opinion that the proposed regulation would be an attempt by the board of conservation to promulgate a rule extending the operation of the statute, and would be in conflict with the statute, and be beyond the lawful authority of the state board of conservation.

068-83—July 3, 1968

COUNTY JUDGES' COURTS

AUTHORITY OF CLERK TO ADMINISTER OATHS— SIGNATURE, USE OF COURT SEAL

To: *George T. Clark, President, Florida County Judges' Association, Miami*

QUESTIONS:

1. Is a clerk of a County Judge's Court in Florida authorized to administer oaths in connection with the work of the court such as an oath on a marriage license, an application for a duplicate driver's license, an application for a delayed birth certificate, probate pleadings or an oath of a personal representative?

2. Assuming the answer to question 1 is in the affirmative, should the certificate be signed in the name of the judge by the clerk, as clerk, or should the clerk sign his name only as clerk of the county judge's court?

3. Assuming the answer to question 1 is in the affirmative, should the clerk use the seal of the county judge's court in connection with his signature in either case?

4. Is the clerk of the county judge's court authorized to take oaths generally, such as the acknowledgment of a deed or the oath in connection with an affidavit, or is he limited to taking oaths in connection with the work of the county judge's court?

AS TO QUESTION 1:

Section 36.04, F. S., provides in part: "Every county judge shall have power to appoint a clerk of his court, . . . and each may exercise all nonjudicial functions which the judge may perform, . . ." (Emphasis supplied.)

Section 36.02, F. S., provides in part: "County judges' courts shall be courts of record, . . ."

Section 90.01(1), F. S., provides in part: "Oaths, affidavits and acknowledgments required or authorized under the laws of this state . . . may be taken or administered by or before any judge, clerk or deputy clerk of any court of record . . ." (Emphasis supplied.)

Since an oath may be taken or administered by a clerk of a court of record under the provisions of §90.01(1), F. S., above-quoted, and the clerk of the county judge's court is, under the provisions of §36.02, F. S., the clerk of a court of record, it would appear that the clerk of a county judge's court may take or administer oaths in connection with

the work of the court in matters such as those enumerated in the question set out above. Accordingly, question 1 is answered in the affirmative.

AS TO QUESTION 2:

Generally the clerk should sign his name only as clerk of the court rather than in the name of the judge. The procedure would however depend upon the specific document involved. In this regard I would direct your attention to the Florida Rules of Civil Procedure which are under the provisions of Rule 1.010, applicable to all county courts and all county judges' courts in civil matters. Under Civil Procedure Rule 1.070(a) the process authorized by law shall be issued "... by the clerk or judge. . . ." Under Rule 1.410 "... the clerk shall issue a subpoena . . . for the production of documents . . . signed and sealed. . . ."

Under Civil Procedure Rule 1.500, the clerk may "... enter a default . . ." Under Rule 1.580 the clerk may issue a writ of assistance on order of the court.

Forms for compliance with the rules are found in the Form Section of the Rules beginning with Form 1.902. Generally each form is to be signed:

WITNESS my hand and the seal of said Court on _____,
19____.

(Name of Clerk)
As Clerk of said Court
By _____
As Deputy Clerk

In particular your attention is directed to Forms 1.902 through 1.917, 1.919 and 1.920. These comments and the reference to the forms for use in connection with the Civil Rules of Procedure should provide an adequate answer to question 2.

AS TO QUESTION 3:

Where required by statute or rule such as under Rule 1.410, *supra*, the clerk should use the seal of the court in conjunction with his signature. Should there be any doubt in the clerk's mind as to whether the seal is necessary it would, out of an abundance of caution, seem appropriate to use the seal of the court to insure full compliance with any statutory requirement. Question 3 is answered accordingly.

AS TO QUESTION 4:

I direct your attention to the provisions of §695.03, F. S., which require instruments conveying an interest in real property generally to be acknowledged. Under the provisions of §695.03(1), F. S., such acknowledgments if made in this state "... may be made before any judge, clerk or deputy clerk of any court of record, . . ." (Emphasis supplied.)

Since the statute just mentioned provides for the taking of an acknowledgment in connection with deeds or other instruments relating to real property it appears that a clerk would be authorized to take acknowledgments in such matters in addition to administering oaths and acknowledgments in connection with the work of the court. Question 4 is answered accordingly.

068-84—July 22, 1968

TAXATION

OMITTED ASSESSMENT FOR LAND IMPROVEMENT—
REASSESSMENT FOR SAME TAX PERIOD
PROHIBITED

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

STATEMENT OF FACT:

In 1967, the Volusia County Tax Assessor assessed a certain taxpayer's land without adding the improvements thereon in the taxable amount of \$180,000. The taxpayer was billed by land description for \$7,298.90, which amount was promptly paid by the taxpayer. Thereafter, the tax assessor discovered that he had omitted the assessment for the improvements, which consisted of a motel and valued in the amount of \$641,140. This motel had been valued by the tax assessor prior to certification of the 1967 tax roll, but was omitted through a clerical error.

QUESTION:

May the Volusia County Tax Assessor now correct the 1967 assessment, resulting in the taxpayer being billed for an additional amount of \$26,389.33, which amount represents the taxes due on the valuation of the improvements and which was omitted on the tax bill furnished the taxpayer?

Your question is answered in the negative.

We are concerned with analyzation of §§193.23 and 192.21, F. S. Section 192.21, F. S., deals in part with the correction of errors of omission and commission. Section 193.23, F. S., deals with the taxation of property which has escaped taxation.

In the case of Okeelanta Sugar Refinery, Inc., v. Maxwell, Fla., 183 So.2d 567, pp. 568 and 569 it is stated:

To "escape taxation" means to get free of tax, to avoid taxation, to be missed from being taxed, or to be forgotten for tax purposes. *Once the Tax Assessor has certified the tax roll and the tax levied thereon paid on particular described property, said property cannot against [sic] be taxed for that particular year. . . .* Nevertheless, in the absence of a showing that a particular taxable property has "escaped taxation," the same property cannot be taxed again under F.S.A. Section 200.16, and *any such attempt to backtax such property is void. . .* The Tax Assessor has ample tools at his command to assure that all property is returned for taxation. He or his deputy is required to visit each precinct to ascertain by diligent inquiry the name of all taxable persons and property for each year. He may require the production of books and records under the provisions of F.S.A. Section 200.11. He may also serve notice of increased valuation as provided in F.S.A. Section 200.10 and thereby place the burden on the taxpayer to produce the books and records showing the full cash value thereof. (Emphasis supplied.)

In this case the amended complaint alleged that the plaintiff-taxpayer had paid its real estate and tangible personal property taxes

in Palm Beach County for the years 1961, 1962, and 1963. The taxpayer did not file a return as required by §200.08, F. S. (In the instant situation it is not known if the taxpayer did or did not file a return; however this does not appear to be of import since the court pointed out in the Okeelanta case that the Tax Assessor is required by §193.021, F. S., to assess all real property in the county even though no return is filed.)

In the Okeelanta case the property involved had been assessed in the years 1961 through 1964, inclusive. The value of the property was greatly increased in the year 1964. The taxpayer paid the 1964 tax on the increased valuation without protest, and the tax assessor then attempted to back assess the property for the years 1961, 1962, and 1963, on the basis of the increased valuation for the year 1964.

In the instant case the property involved has been assessed by the Tax Assessor and the tax bill sent to the taxpayer. The taxes have been paid. This seems to bring the present situation within the language of the Okeelanta case wherein such case pointed out that once the Tax Assessor has certified the tax roll and the tax thereon paid on that particular described property, said property cannot again be taxed for that particular year.

The case of *City of Naples v. Conboy*, Fla., 182 So.2d 412, similarly adheres to the rationale expressed in the Okeelanta case to the effect of placing the burden on the tax assessor to use the tools at his disposal to ensure that property is assessed at its full cash value. In the Conboy case it is stated at p. 418:

... Where the taxing authority is in full possession of all pertinent facts it is better to impose the burden upon it to exercise care than to create uncertainty as to the tax status of property for prior years. Compare *Coppock v. Blount*, 145 So.2d 279 (Fla.App. 3d Dist. 1962); *Sharrow v. City of Dania*, Fla.1955, 83 So.2d 274; *City of Miami Beach v. 8701 Collins Avenue, Inc.*, Fla.1955, 77 So.2d 428; and *Texas Co. v. Town of Miami Springs*, Fla.1950, 44 So.2d 808.

The conclusions reached here are consistent with those reached in the case of *Florida Nat. Bank of Jacksonville v. Simpson*, Fla., 59 So.2d 751, which involved intangibles. In construing §199.29, F. S., which dealt with the back-assessing of intangibles the court stated at pp. 756 and 757:

... However, Section 199.29 *only authorizes* the tax assessor to back-assess intangible personal property which for any reason has "escaped taxation"—*not to raise the valuation of intangible personal property which originally had been erroneously valued*. The failure of the legislature to *authorize the tax assessor in Section 199.29 to raise the valuation of intangibles which initially had been erroneously valued* is, to our minds, very significant. . . . If the assessor upon the filing of the return increases the valuation, or fails to increase it, *the intangible, nevertheless, has been taxed*. Certainly it has not "escaped taxation." (Emphasis supplied.)

The case also recognizes the rationale expressed in both the Okeelanta case and the Conboy case that the Tax Assessor has certain duties to perform and ample tools to allow for the proper performance of said duties. It recognizes the principle that there is a presumption that every official will perform or has performed the duties imposed upon

him by law. This case also pointed out that there was no continuing power to back-assess property on account of undervaluation thus adhering to the principle involving the time of cessation expressed in the case of *Gilespie v. Thursby*, 104 Fla. 103, 139 So. 372, and cited in the *Okeelanta* case.

Section 192.21, F. S., allows for the corrections of omissions and commissions. This section first came into being in 1925. Prior to said time taxpayers were able to defeat tax assessments by pointing out minor errors made by tax assessors in failing to strictly adhere to the procedures established for the collection of taxes. Section 192.21, F. S., provided that these procedures were directory, not mandatory. I do not read §192.21, F. S., as allowing for revaluation of property which had been erroneously assessed through mistake or inadvertence, where the tax bills had been mailed and the taxes paid on that particular *described* property. This is consistent with that expressed in the *Conboy* case at p. 418: "We construe F. S. §192.21, F.S.A. relative to the correction of acts of omission or commission on the part of tax assessors at any time as relating to the effect of the validity of the lien of the taxes assessed. . . ." (Emphasis supplied.)

In the case of *State v. Lummus*, 149 So. 650, the court said, at p. 651:

. . . The effect of the statutes is to impose upon the tax assessor a continuing duty to prepare according to law a legal tax roll, and, if through oversight, mistake, or inadvertence he has failed to do so, the statute itself affords ample power and authority for the tax assessor to correct his mistake in the preparation of the roll by forthwith making the necessary changes and amendments of the roll to make the same conform to the "form of things" required by the tax laws, and the effect of the statute is to impose upon the officer having the actual custody of the tax roll requiring correction the duty to permit access to it by the tax assessor in order that the tax assessor may do what the law requires him to do so as to show a regular and valid record of his assessment. . . . (Emphasis supplied.)

Also see AGO's 064-139, Biennial Report of the Attorney General, 1963-1964, p. 450, and 065-137 (1965-1966, p. 203), and *Thompson v. City of Key West, Fla.*, 82 So.2d 749.

The case of *Palmer v. Beadle County*, 15 N.W.2d 6, involved a case where a tax assessor undervalued a lot by erroneously not including a building. The court held that the assessor could not make a reassessment and include the building. The court referred to a South Dakota Statute dealing with the land and structures thereon pointing out that these constituted one class of real property. (To like effect see §192.02, F. S.)

In the case of *Hunt v. District of Columbia*, 108 F.2d 10, the court stated at pp. 12-14:

The rule approved by the great weight of authority of this country is that the power to assess 'omitted property' does not carry with it the power to revalue property *already assessed*. . . The difference between the amount of the investment and the value of the stocks was, at most, an *error in valuation* and not an omission, since *omitted property* means property which is *not assessed* at all and not property which is *merely undervalued*. See 2 Cooley on Taxation, Sec. 820, and cases cited *supra*. . . It is not sufficient that the assessors,

through lack of information or otherwise, have erred in their judgment of the *quantity, quality, or value* of the thing assessed. *Dresden v. Bridge*, 90 Me. 489, 38 A. 545. *If the assessors have once assessed . . . that assessment cannot be revised by a supplemental assessment.* [98 Me. 145, 56 A. 586.] . . . In *Davidson v. Franklin Ave. Inv. Co.*, supra, the taxpayer owned improved real estate. The taxing authorities assessed the land for taxation, but *omitted to assess the building*. The court stated the question to be—did the auditor have power to reassess as omitted property real estate which had been assessed and on which taxes had been paid, because the property was undervalued in the years in question by failure of the assessing office to take note of the building—and answered the question in the negative, saying that it was *not* a case of omitted property but of *undervalued* property. (Emphasis supplied.)

To like effect see Vol. 2 Cooley on Taxation, Sections 59, 820 and 1077. Section 1077, states in part:

Reassessment, where not provided for by statute, is generally invalid, especially where the original assessment is valid. But where an assessment is void either wholly or in part, a reassessment is generally allowed under express provisions of the statute or necessary implications therefrom. Statutes prohibiting reassessment of property except that which has never been assessed are construed to prohibit reassessment of property which has escaped adequate assessment through fraud or which has been in any degree assessed by the authorized officers. A retrospective law may be passed providing for the reassessment of grossly undervalued property. . .

Your letter does not indicate that the taxpayer has been guilty of fraud or design in misleading or concealing pertinent facts from the taxing officials.

I conclude that your question is answered in the negative. Due to the amount of taxes involved and the possible ramifications on the Tax Assessor, it may well be advisable that the matter be resolved by a court of competent jurisdiction.

068-85—July 23, 1968

TAX DISTRICTS

SPECIAL ASSESSMENT OF TAX—HOMESTEAD EXEMPTION— EAST FLAGLER MOSQUITO CONTROL DISTRICT

To: Donald R. Moore, Tax Assessor, Flagler County, Bunnell; Lyman L. Gage, Secretary, East Flagler Mosquito Control District, Flagler Beach

QUESTION:

Does the East Flagler Mosquito Control District have the right to assess taxes on homestead exempt property?

Your question is answered in the negative.

The question requires an examination of the nature of the imposition levied by the East Flagler Mosquito Control District. If this imposition is a tax, then it cannot be imposed on homestead exempt

property as set forth in §7, Art. X, State Const. However, if it is a special assessment or an assessment for special benefits (the two being synonymous) then it may be imposed on property classified as homestead exempt property.

Your letter does not so indicate, but I assume that the East Flagler Mosquito Control District was created as provided by Ch. 388, F. S. It has been subsequently dealt with by Ch. 57-1321, Laws of Florida.

Section 388.221, F. S., allows for the levying of a special tax. Said section provides in part:

The board of commissioners of such district *may levy* upon all of the real and personal taxable property in said district a *special tax* not exceeding ten mills on the dollar during each year as *maintenance tax to be used solely for the purposes authorized and prescribed by this chapter.* . . (Emphasis supplied.)

Note that this refers to a maintenance tax to be used solely for the purposes authorized and prescribed by this chapter. Section 388.041, F. S., in dealing with the duty of the county commissioners concerning the petition which serves to initiate the forming of mosquito control districts, refers to a determination being made that the improvements proposed to be made are for the public health, comfort, and welfare.

Section 388.161, F. S., deals with the powers and duties of the board of commissioners of said district. Section 388.161(1), F. S., provides in part:

The board of commissioners *may do any and all things necessary for the control and elimination of all species of mosquitoes and other arthropods of public health importance and the board of commissioners is specifically authorized to provide for the construction and maintenance of canals, ditches, drains, dikes, fills, and other necessary works and to install and maintain pumps, excavators, and other machinery and equipment, to use oil, larvicide paris green or any other chemicals approved by the state board of health but only in such quantities as may be necessary to control mosquito breeding and not be detrimental to fish life.* (Emphasis supplied.)

Thus the tax levy allowed by §388.221, F. S., appears to be to provide the necessary funds for carrying out the purposes set forth in §388.161(1), F. S., which had previously been found to be for the public health, comfort, and welfare.

In the case of *Bair v. Central and Southern Florida Flood Con. Dist., Fla.*, 144 So.2d 818, the court was called upon to determine the question of the nature of the imposition levied by the district. Therein the court stated:

. . . The imposition of a levy *uniformly throughout the district* necessarily and, we think, properly upon this record implies a finding of benefits accruing in some fashion either direct or indirect to *all real property located therein*, and the cited cases clearly control the question of valid relationship between such benefits and the levy on the particular parcels here involved, *more properly characterized as an ad valorem tax for special purposes rather than a special assessment on an ad valorem basis*: "For a general, common, public benefit to a taxing unit as a whole, lands in the taxing unit may be reasonably assessed [on an ad valorem basis] by legislative

authority, even though the lands as such are not immediately or directly benefited by the public improvement, when the assessment is not an abuse of authority." (Emphasis supplied.)

In the case of *St. Lucie County-Fort Pierce Fire Prevention and Control District v. Higgs, Fla.*, 141 So.2d 744, the court decided a similar question and stated:

We agree with the learned circuit judge that the levy is a tax and not a special assessment for the reason he gave, namely, that no parcel of land was specially or peculiarly benefited in proportion to its value, but that the tax was a general one on all property in the district for the benefit of all. . . . To be legal, special assessments must be directly proportionate to the benefits to the property upon which they are levied and this may not be inferred from a situation where all property in a district is assessed for the benefit of the whole on the theory that individual parcels are peculiarly benefited in the ratio that the assessed value of each bears to the total value of all property in the district. . . . (Emphasis supplied.)

In the case of *Whisnant v. Stringfellow*, 50 So.2d 885, the court held that a tax levied and assessed for a county health unit was not an "assessment for special benefits" within the purview of the constitutional provision exempting homestead property from all taxation except "assessments for special benefits."

In the case of *Fisher v. Board of County Commissioners of Dade County, Fla.*, 84 So.2d 572, the court confronted this question:

. . . The question readily appearing is whether a special improvement district can be created with authority to pave and repair streets and provide street lighting and assess the costs and maintenance thereof against all real property within the district, including homesteads, entirely on the basis of the ad valorem valuation of such real property without particular regard to the "special benefits" accruing to such property from the particular improvements. (Emphasis supplied.)

The Court answered this question in the negative and in so doing pointed out that no exact valuation of benefits had been made. The Court set forth certain governing guidelines beginning at page 576 and page 577:

In *Atlantic Coast Line R. Co. v. City of Lakeland*, 94 Fla. 347, 115 So. 669 at page 675, this Court through the late Mr. Justice Ellis held: "The question of whether property abutting upon a street is in fact specially benefited by the paving of the street does not rest exclusively in the judgment or upon the 'ipse dixit' of the municipal officer or officers, if there are more than one, who asserts authority over municipal affairs, but it is a question of fact to be ascertained and established as any other fact, and the proportion of the cost to be assessed against a particular lot must bear a reasonable and fair relation to the special benefits which actually accrued." (Emphasis supplied.)

. . . In the same opinion it was pointed out that the extent to which property abutting upon a paved street may be said to be "specially benefited" by the paving depends upon a number of circumstances such as the use to which the property

is put, whether it is devoted to business or residences and the reasonable cost of the improvement as related to the particular property. A 'special benefit assessment' must be levied according to the particular benefits received by the real property in question and in order to sustain the assessment, there must be some proof of the benefits other than the dictum of the governing agency. The actual cost of the improvement must be directly related to the "special benefit" alleged to be received by the property improved. (Emphasis supplied.)

. . . In all cases assessments against benefited property must be fairly apportioned and lawfully made. See *Parrish v. Hillsborough County*, 98 Fla. 430, 123 So. 830. An assessment for special benefits must be "according to" or must have a "relation to" or some "reference to" the special benefit resulting to the particular property assessed in order to bring it within the exceptions to the homestead exemption prescribed by Article X, Section 7, of the Florida Constitution. (Emphasis supplied.)

The imposition provided for in §388.221, F. S., seems clearly to be one levied to pay for the cost of operation and maintenance of the district in fulfilling its purpose and performing its duties as set forth in §388.161, F. S. The imposition is not according to the benefit resulting to the particular property assessed. In the *Fisher* case at p. 576, the court stated: ". . . [T]here is nothing in this record to show any actual attempt to evaluate the benefits to be received by the various properties abutting the streets to be improved . . ." (Emphasis supplied.)

Similarly in the instant situation there is nothing to show that any attempt has been made to evaluate the benefits accruing to the various property owners within the district. Contrarily, all are apparently taxed uniformly on the basis of the valuation placed upon each parcel of property. This is a tax and not an "assessment for special benefits."

The homestead exempt property would be exempt up to the assessed valuation of \$5,000 as provided in §7, Art. X, State Const.

This conclusion is in accord with AGO 049-88, Biennial Report of the Attorney General 1949-1950, p. 418.

Also see *Klemm v. Davenport*, 100 Fla. 527, 129 So. 904, 70 A.L.R. 156, which distinguished a tax from a special assessment; *Crowder v. Phillips*, 146 Fla. 428, and on rehearing at 146 Fla. 440, 1 So.2d 629; *City of Ft. Lauderdale v. Carter*, Fla., 71 So.2d 260; *City of Orlando v. State*, Fla., 67 So.2d 673; and *State ex rel. Board of Commissioners of Florida Inland Navigation District v. Lathan*, 121 Fla. 486, 163 So. 890.

068-86—July 23, 1968

TAXATION

HOMESTEAD EXEMPTION OF PROPERTY SEPARATED BY STATE HIGHWAY

To: *Alfred O. Shuler, Attorney, Franklin County Board of Commissioners, Apalachicola*

QUESTION:

Would 2 parcels of property having the same chain of title,

within the acreage limits set forth in §1, Art. X, State Const., separated by a state highway, which existed before the homestead was built and claimed, be entitled to homestead exemption?

Your question is answered in the negative.

In AGO 055-327, Biennial Report of the Attorney General, 1955-1956, p. 426, this office considered a similar question concerning 3 parcels of land within a municipality having a combined area of less than $\frac{1}{2}$ acre joined only at the corners. In so doing it was stated:

The rules previously adopted by the courts in construing §1, et seq., Art. X, State Const., as to what constitutes a homestead and its character is applicable to homesteads for the purpose of tax exemption (*L'Engle v. Forbes*, Fla., 81 So.2d 214, text 216; *Jacksonville v. Bailey*, 159 Fla. 11, 30 So.2d 529); . . .

In AGO 055-255, Biennial Report of the Attorney General, 1955-1956, p. 335, it was stated:

Under §7, Art. X, State Const., the \$5000 homestead tax exemption extends to the "home and *contiguous real property*, as described in §1, Art. X, of the constitution. . . ." Under the decisions of the supreme court of Florida a tract of land *detached from or not contiguous to the land claimed as a homestead* is not a part of the constitutional homestead. . . (Emphasis supplied.)

In the case of *Milton v. Milton*, 58 So. 718, the court stated at p. 719: "A tract of land *detached from or not contiguous* to the land claimed as a homestead is not a part of the homestead exemption. *Brandies v. Perry*, 39 Fla. 172, 22 South. 268, 63 Am. St. Rep. 164." (Emphasis supplied.)

In the early case of *Brandies v. Perry*, 22 So. 268, the court considered a similar question concerning a detached tract of land separated from the homestead by other parcels of land neither owned nor occupied by the owner of the homestead, where such other tract of land was used and cultivated as part of the homestead. The court found that the owner was not entitled to claim the constitutional homestead exemption on such detached tract of land. In so doing the court construed the constitution at p. 270 of said case in part:

From this definition of a homestead, it is evident that the framers of our constitution had in mind, *not an exemption, of a given quantity of land* for the benefit of a debtor, but the protection from forced sale of the *family home* for the benefit of the debtor and his family. This view is emphasized by the language, "a homestead, to the extent of one hundred and sixty acres of land," meaning a family home place, to the limit, size, or bulk of 160 acres. This being the plain meaning of the language used, it is clear that *a separate tract of land, never occupied by the family and its head as a home, cannot be exempt from forced sale*, unless it can be inferred that, by reason of its use as a part of the same farm with the actual home place, it becomes a part thereof for homestead purposes. There is *no language in the constitution to warrant such an inference*. . . The use of land for homestead purposes, *other than an actual bona fide residence thereon as a home for the*

occupant and his family, is *no test* by which to ascertain if it is exempt, because it is not made such by the constitution; *neither can its use in connection with make it a part of the tract upon which the home is located, where the two tracts are entirely separate and distinct. . . .* (Emphasis supplied.)

The situation posed by your letter is dissimilar from that which confronted the court in the case of *Clark v. Cox*, 85 So. 173. In that case the pivotal question was whether or not there had been an abandonment of the homestead by the conveyance of a railroad right-of-way through the homestead property. There the court pointed out that a homestead once established continued to be a homestead until abandoned and found that the property on the railroad right-of-way was still impressed with the homestead status.

In the situation posed by your letter you point out that the state highway existed before the homestead was claimed. I conclude therefore that the parcel of real estate separated from the homestead is not entitled to homestead exemption.

I also refer you to AGO 057-6, Biennial Report of the Attorney General, 1957-1958, p. 7; AGO 052-98, Biennial Report of the Attorney General, 1951-1952, p. 352; *Shone v. Bellmore*, 78 So. 605; *Wilson v. Florida Nat'l Bank & Trust Co. at Miami*, 64 So.2d 309; and *State ex rel. Dunscombe v. Courson*, 198 So. 108.

068-87—July 23, 1968

TAXATION

MILLAGE, METHOD OF FIXING, LIMITATION—CONSTRUCTION OF §§193.031 AND 193.321-193.327, F. S.

To: *Fred O. Dickinson, Jr., State Comptroller, Tallahassee*

QUESTION:

Is Hillsborough County, as well as other governing authorities of taxing districts in this state, limited to the rate of millage fixed in 1967, or may the county and the other governing authorities of taxing districts in this state avail themselves of provision of §193.031, F. S., and increase the millage by not more than 10%?

As I construe your question, it deals with Hillsborough County and other counties situated like Hillsborough County. Your letter states:

Hillsborough County is in the process of preparing its budget for the 1968-69 fiscal year and is concerned of the millage to be affixed for the year 1968. In 1967, this county accomplished reevaluation and complied with §193.03, F. S., in fixing millage for that tax year.

You further state that on the effective date of Ch. 67-395, Laws of Florida, now found in §§193.321-193.327, F. S., inclusive, Hillsborough County's rate of millage was in excess of 10 mills.

Section 1, Ch. 67-395, Laws of Florida (§193.321(1), F. S.) provides in part:

Except as otherwise provided herein, *no aggregate ad valorem tax millage, shall be levied* against real and tangible personal property by counties and districts as herein defined

in excess of ten (10) mills on the dollar of assessed value, except for special benefits and debt service on obligations issued in connection therewith, except for that millage authorized in article XII, sections 8 and 10 of the Florida constitution. . . . However, nothing in this act shall prevent any board of county commissioners or board of public instruction to each levy at least five (5) mills, and the provisions of section 193.03, Florida Statutes, shall not apply herein to this extent. (Emphasis supplied.)

As I interpret said provision this establishes a positive limitation on the aggregate ad valorem tax millage levied against real and tangible personal property by counties and districts. This limitation is in the amount of 10 mills on the dollar of assessed value. It does not include special benefits and debt service on obligations in connection therewith, nor that millage authorized in §§8 and 10, Art. XII, State Const.

I construe special benefits to be synonymous with "assessments for special benefits" as referred to in §7, Art. X, State Const. Therefore, millage imposed as an assessment for special benefits would not be included in calculating the aggregate ad valorem tax millage. These are sometimes referred to as special assessments as well as assessments for special benefits.

The distinction between a tax and a special assessment for special benefits thus becomes of substantial import in determining what constitutes the aggregate ad valorem tax millage referred to in section 1, Ch. 67-395, Laws of Florida (§193.321, F. S.).

In *Klemm v. Davenport*, 100 Fla. 627, 129 So. 904, 70 A.L.R. 156, it is stated:

A "tax" is an enforced burden or contribution imposed by sovereign right for the support of the government, the administration of the law, and to execute the various functions the sovereign is called on to perform. A "special assessment" is like a tax in that it is an enforced contribution from the property owner, it may possess other points of similarity to a tax, but it is *inherently different* and governed by entirely different principles. It is imposed upon the theory that that *portion of the community which is required to bear it receives some special or peculiar benefit in the enhancement of value of the property against which it is imposed as a result of the improvement made with the proceeds of the special assessment. It is limited to the property benefited, is not governed by uniformity, and may be determined legislatively or judicially.* *Cooley on Taxation* (3d Ed.) vol. 2, 1153; *Words and Phrases Second Series*, vol. 4, p. 625, and cases there cited. See also *Whitney v. Hillsborough County* (Fla.) 127 So. 486; *Atlantic Coast Line R. Co. v. Lakeland* (Fla.) 115 So. 669, text 683. (Emphasis supplied.)

Also see *Illinois Cent. R. Co. v. City of Decatur*, 147 U.S. 190, 13 Sup. Ct. 293, 37 L. Ed. 132.

Questions will no doubt arise as to the nature of the imposition imposed by certain districts which have taxing power. Generally, these will have to be considered individually adhering to certain guidelines which have been established by the courts. In this respect I refer you to the *Klemm* case, *supra*, and *Bair v. Central and Southern Florida Flood Control District*, 144 So.2d 818, which states at p. 820 in part:

The imposition of a levy *uniformly throughout the district* necessarily and, we think, properly upon this record implies a finding of benefits accruing in some fashion either direct or indirect *to all real property located therein*, and the cited cases clearly control the question of valid relationship between such benefits and the levy on the particular parcels here involved, *more properly characterized as an ad valorem tax for special purposes rather than a special assessment on an ad valorem basis*: "For a general, common, public benefit to a taxing unit as a whole, lands in the taxing unit may be reasonably assessed [on an ad valorem basis] by legislative authority, even though the lands as such are not immediately or directly benefited by the public improvement, when the assessment is not an abuse of authority."

Also see *St. Lucie County-Fort Pierce Fire Prevention and Control District v. Higgs, Fla.*, 141 So.2d 744, which states at p. 746 in part:

We agree with the learned circuit judge that the levy is *a tax and not a special assessment* for the reason he gave, namely, that no parcel of land was *specially* or peculiarly benefited in proportion to its value, but that the tax was a general one on all property in the district for the benefit of all. . . . To be legal, special assessments must be directly proportionate to the benefits to the property upon which they are levied and this *may not* be inferred from a situation where *all* property in a district is assessed for the benefit of the *whole* on the theory that individual parcels are peculiarly benefited in the ratio that the assessed value of each bears to the total value of all property in the district. . . . (Emphasis supplied.)

For further reference see *Martin v. Dade Muck Land Co.*, 116 So. 449, which involved the Everglades Drainage District; *State v. Anna Maria Island Erosion Prevention Dist.* 58 So.2d 845, which stated in part:

It is therefore our opinion that the legislature was authorized to create Anna Maria Island Erosion Control Prevention District, that no provision of the constitution was violated in so doing, that it was for a proper public purpose and that the Board of County Commissioners of Manatee County *was authorized to issue the bonds and imposed an ad valorem tax sufficient to retire them as they mature.* (Emphasis supplied.)

Also see *Miller v. Ryan*, 54 So.2d 60, which involved advertising tax districts; *State v. Dreka*, 185 So. 616, which involved the Daytona Beach Special Road and Bridge District, the Halifax Hospital District, and the Halifax Special Road and Bridge District; *Crowder v. Phillips*, 146 Fla. 70, 1 So.2d 629; and *State v. Southeastern Palm Bch. County Hosp. Dist.*, 90 So.2d 809.

District is defined in section 3, Ch. 67-395, Laws of Florida (§193.323, F. S.), as follows:

The term "*district*" is defined to mean special districts having the power to levy taxes or require the levy of taxes, including but not limited to boards, commissions, authorities and agencies having authority to levy taxes or require the levy of taxes but shall *not include special school districts nor any multi-county districts.* (Emphasis supplied.)

This section is extremely broad excluding only special school districts and multicounty districts. Thus the aggregate tax millage limitation of 10 mills includes both the counties and districts as defined in the act. That is, both combined cannot exceed 10 mills except as provided in section 2 and referred to in section 4 of said act (§§193.322 and 193.324, F. S.). This conclusion is buttressed by certain language found in section 5 (§193.325, F. S.), which allows those cities and counties which now or hereafter provide both municipal and county services to levy for county, district and municipal purposes a millage up to 20 mills on the dollar of assessed valuation. Also see section 7, Ch. 67-395, Laws of Florida (§193.327, F. S.), in which the legislature expresses itself on the subject of ad valorem taxation. This same legislative intent is emphasized in the preamble to said act wherein the legislature stated:

WHEREAS, the legislature in compliance therewith and in the exercise of its authority desires to limit the overall millage that may be levied for county and district purposes to a specified millage *unless a greater amount is approved at an election by the taxpayers; . . .* (Emphasis supplied.)

Section 4 of said act (§193.324(1), F. S.), provides in part:

Any county whose rate of taxation as defined in section 1 exceeds ten (10) mills at the effective date of this act shall be authorized to continue at such greater rate of taxation until January 1, 1970 without the referendum provided for in section 2. However, *no* increase beyond that rate shall be permissible except through a referendum as provided for in section 2. (Emphasis supplied.)

Hillsborough County, being a county having a millage in excess of 10 mills, would be within the purview of this section.

Chapter 67-395, Laws of Florida, contains a general repealing clause which is found in section 9. However, it is clear that Ch. 67-395, was not intended to repeal in total §§193.03 and 193.031, F. S., since these sections are referred to in section 1 (1) and section 5, Ch. 67-395, Laws of Florida (§§193.321(1), 193.325, F. S.). Section 5, Ch. 67-395, Laws of Florida (§193.325, F. S.), provides where material:

Nothing contained herein shall be construed to *conflict with nor repeal sections 193.03 and 193.031, Florida Statutes, provided however*, the provisions of section 193.031, Florida Statutes, shall *not* prevent an increase of millage *approved in section 2 hereof . . .* (Emphasis supplied.)

In 82 C.J.S., pp. 379-487, it is pointed out that repeal by implication is not favored and that a later act will only be held to repeal a prior act where they are clearly repugnant. Both §§193.03 and 193.031, F. S., and Ch. 67-395, Laws of Florida, deal with the subject of millage limitation. Chapter 67-395, Laws of Florida, is the later word of the legislature.

Section 4, Ch. 67-395, Laws of Florida (§193.324, F. S.), is clear in providing that as to counties whose rate of taxation exceeds 10 mills at the effective date of this act, such counties may not increase their millage except through a referendum as provided for in section 2, Ch. 67-395, Laws of Florida (§193.322, F. S.). Thus the procedure for increasing the millage is repugnant to the procedure outlined in §§193.03 and 193.031, F. S., and to the extent of such repugnance the later ex-

pression of the legislature, Ch. 67-395, Laws of Florida, must prevail.

This conclusion is consistent with the legislative intent found in the title to said act wherein the legislature expressed itself as to its desire to limit the overall millage that may be levied for county and district purposes to a specific millage unless a greater amount is approved at an election by the taxpayers. Similarly section 4, Ch. 67-395, Laws of Florida (§193.324, F. S.), authorizes such counties to continue at their present rate until Jan. 1, 1970.

No reference is made to the allowance of increases beyond their present rate by any procedure or manner referred to in §§193.03 and 193.031, F. S. The only procedure referred to for increasing the millage beyond that rate is through a referendum as provided for in section 2 of Ch. 67-395, Laws of Florida (§193.322, F. S.). The legislature in positive language speaks in terms only of continuing at the present rate until Jan. 1, 1970. Thus any increase beyond the present rate for those counties whose present rate is in excess of 10 mills can only be accomplished by referendum as provided in section 2, Ch. 67-395, Laws of Florida (§193.322, F. S.). Therefore, Hillsborough County can only increase its millage through the procedure outlined in section 2, Ch. 67-395, Laws of Florida (§193.322, F. S.).

Section 2, Ch. 67-395, Laws of Florida (§193.322, F. S.), refers to such elections being called by the governing body of any such county or district. This clearly indicates that where said district within the county, where there is presently a millage in excess of 10 mills, desires to increase the millage, it must follow the procedure set forth in section 2, Ch. 67-395, Laws of Florida.

These conclusions are consistent with the obvious legislative intent expressed in Ch. 67-395 Laws of Florida (§§193.321-193.327, F. S.), and Ch. 67-396, Laws of Florida (§§167.441-167.445, F. S.), of imposing a definite millage maximum on ad valorem taxation. Any counties presently levying in excess of 10 mills are allowed until Jan. 1, 1970, to reduce their millage to the required 10 mills.

068-88—July 23, 1968

TAXATION

MILLAGE—LIMITATION, MUNICIPALITIES—CONSTRUCTION OF §§167.441-167.445, F. S., EFFECT THEREOF UPON §§193.321-193.327, F. S.

To: *Thomas A. Thomas, Attorney, Hollywood*

QUESTION:

Can the City of Hollywood increase its millage by 14% in order to obtain sufficient revenue from ad valorem taxes to meet its anticipated obligations?

You are concerned over the authority of the City of Hollywood to increase its millage by 14% and over what procedure should be followed for the City of Hollywood to obtain such an increase.

Your question requires an analysis of Ch. 67-396, Laws of Florida (§§167.441-167.445, F. S.). It then requires a construction of Ch. 67-396, Laws of Florida, and the effect, if any, it has on §§193.03 and 193.031, F. S.

Section 1, Ch. 67-396, Laws of Florida (§167.441, F. S.), expresses an intent to limit the millage applied by municipalities on the assessed

value of real and tangible personal property to 1% or 10 mills. It sets a maximum millage. It does not establish a minimum millage. It also contains certain exceptions.

Sections 193.03 and 193.031, F. S., also deal with millage. Section 193.031, F. S., includes municipalities.

Section 2, Ch. 67-396, Laws of Florida (§167.442, F. S.), provides a procedure which must be used where millage in excess of the 1% or 10 mills maximum is desired. Section 193.031, F. S., provides a procedure which must be used where millage in excess of that allowed by law is desired. Section 7, Ch. 67-396, Laws of Florida, provides: "Any general, special or local law in conflict herewith is hereby repealed." Chapter 67-396, Laws of Florida, §§193.03 and 193.031, F. S., are all general laws. Chapter 67-396, Laws of Florida, is the latest expression of the legislature. The question to be determined is: What effect, if any, does section 7, Ch. 67-396, Laws of Florida, have on §§193.03 and 193.031, F. S.?

82 C.J.S., pp. 475 and 476, points out generally that such language does not in and of itself add to the repealing effect of the act, of which it is a part, since all prior conflicting laws or parts of laws will be repealed by implication. Therefore, section 7, Ch. 67-396, Laws of Florida, does not in and of itself repeal §§193.03 or 193.031, F. S. Thus it must be determined if said sections of the Florida Statutes have been repealed by implication in whole or in part.

It must be borne in mind, that nowhere in Ch. 67-396, Laws of Florida, is any reference made to the rollback law or §§193.03 and 193.031, F. S. The act is totally silent in this respect. It should also be remembered that repeal by implication is not favored and will only be found to exist where the legislative intent to repeal or supersede the statute plainly and clearly appears. See C.J.S., pp. 379-485.

At p. 487 of said authority, it is pointed out that the rules concerning repeal by implication are particularly applicable where subsequent legislation shows that the legislature deems the law still to be in existence. The case of *Peninsular Industrial Ins. Co. v. State*, 55 So. 398, states: "... Legislative enactments upon the same subject should be considered as an entirety in ascertaining the real legislative intent and purpose."

Section 5, Ch. 67-395, Laws of Florida, refers to §§193.03 and 193.031, F. S., and sections 1 and 4 refer to §193.03, F. S. This clearly indicates that the legislature did not intend to repeal §§193.03 and 193.031, F. S., by the enacting of Ch. 67-396, Laws of Florida. (Note that both Chs. 67-395 and 67-396, Laws of Florida, became effective on Jan. 1, 1968.)

Section 4, Ch. 67-395, Laws of Florida (§193.324(2), F. S.), where material, provides in part:

The provisions of this section shall not apply to those counties undergoing total revaluation in 1967 until after such counties have completed such revaluation and have set millage rates subject to section 193.03, Florida Statutes. . . . (Emphasis supplied.)

Section 5, Ch. 67-395, Laws of Florida (§193.325, F. S.), where material, provides: "Nothing contained herein shall be construed to conflict with nor repeal sections 193.03 and 193.031, Florida Statutes, provided however, the provisions of section 193.031, Florida Statutes, shall not prevent an increase of millage approved in section 2 hereof. . . ." (Emphasis supplied.)

Section 2, Ch. 67-396, Laws of Florida (§167.442, F. S.), is very similar to section 2, Ch. 67-395, Laws of Florida (§193.322, F. S.), in that both establish the procedure to be utilized when millage in excess of that allowed for in the respective laws is needed. Similarly §193.031, F. S., established a procedure to be utilized when millage in excess of that allowed for by the rollback law is needed. Thus all 3 provide procedure which is to be followed where millage in excess of that allowed is desired. They all deal with the same subject matter of the procedure of increasing millage above that otherwise authorized by law. To this extent there is inconsistency.

Section 2, Ch. 67-396, Laws of Florida (§167.442, F. S.), would prevail over the provision dealing with the procedure for increasing millage established by §§193.03 and 193.031, F. S., to the extent of any inconsistency. (See 82 C.J.S., p. 496.)

Note that section 5, Ch. 67-395, Laws of Florida (§193.325, F. S.), expressly provides that §§193.03 and 193.031, F. S., are not considered as repealed. Therefore, the city would be limited to the increases set forth in said sections.

This assumes that the City of Hollywood is presently assessing at a rate of less than 10%. If the 14% increase would result in a millage being imposed in excess of 10 mills, it would be necessary to utilize the procedure set forth in section 2, Ch. 67-396, Laws of Florida (§167.442, F. S.). If the City of Hollywood is presently assessing at a rate in excess of 10 mills, and desires to increase its millage the procedure set forth in section 2, Ch. 67-396, Laws of Florida, as opposed to the procedure outlined in §§193.03 and 193.031, F. S., must be followed.

As we reconcile Chs. 67-395 and 67-396, Laws of Florida, with §§193.03 and 193.031, F. S., first it is necessary to determine the present aggregate ad valorem tax millage. If the present millage is in excess of 10 mills, the procedure to be utilized for increasing the millage is that set forth in section 2, Chs. 67-395 and 67-396, Laws of Florida. If the additional millage would result in a millage in excess of 10 mills the procedure to be utilized for increasing the millage is that set forth in section 2, Chs. 67-395 and 67-396, Laws of Florida. If the present millage is under 10 mills and the desired increase would not result in an increase in excess of 10 mills the procedure for obtaining said increase would be that outlined in §§193.03 or 193.031, F. S., depending on whether or not the increase is sought in the year of revaluation or in the year subsequent to the year of revaluation.

However, in the last referred to situation, an increase of millage could also be obtained by utilizing the procedure set forth in section 2, Chs. 67-395 and 67-396, Laws of Florida. Thus, alternate procedures would be available. See section 5, Ch. 67-395, Laws of Florida (§193.325, F. S.), which is a clear expression of the legislative intent as to counties and which may be used as a guide to legislative intent as to cities. (Also note unnumbered paragraph, section 1 (1), Ch. 67-395, Laws of Florida (§193.321(1), F. S.), which allows any board of county commissioners or board of public instruction to levy at least 5 mills.)

Reconciling these laws and Florida Statute sections in this manner results in giving deference to the legislative intent as gleaned from the title of Ch. 67-395, Laws of Florida, section 1 (1), Ch. 67-395, Laws of Florida (§193.321(1), F. S.), section 4, Ch. 67-395, Laws of Florida (§193.324, F. S.), and section 5, Ch. 67-395, Laws of Florida (§193.325, F. S.), and results in recognizing the rule that repeal by

implication is not favored and that such seemingly inconsistent laws should be harmonized wherever possible.

068-89—July 24, 1968

PUBLIC SCHOOLS

JUNIOR COLLEGES—NOT PART OF SECONDARY SCHOOLS AS DEFINED BY REGULATION OF U. S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, §414.1(Q), SUBPART A, PART 141, CH. 1, TITLE 45, 30 F.R. 7-12

To: *Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee*

QUESTION:

Are the junior colleges in Florida secondary schools as defined in the regulation of the U. S. Department of Health, Education and Welfare which reads: "Secondary school" means a school which provides secondary education, as determined under state law. The term does not include any education provided beyond grade 12 except that it may include a public junior college when it is a part of or an extension of the secondary school system of the state as determined under state law?

I find nothing in the statutes of Florida which determines that public junior colleges in Florida are part of or an extension of the secondary school system of the state.

Inasmuch as the federal regulation quoted above excludes education provided beyond grade 12, unless state law provides that the junior colleges are a part of or extension of the secondary school system, it would appear to me that junior colleges in the state are not secondary schools within the definition of the above-quoted regulation. Your question is, therefore, answered in the negative.

068-90—August 5, 1968

PUBLIC MONEYS

USE OF MONEY BUDGETED FOR PUBLIC SCHOOL PURPOSES FOR UNIFORMS FOR SCHOOL PERSONNEL

To: *Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee*

QUESTIONS:

1. May money from the school budget be used for working attire for individual athletic directors, coaches, or physical education instructors?

2. May the county include a uniform allowance in their budget to cover the purchase and upkeep of uniforms for maintenance, custodians, matrons, bus drivers, and lunchroom personnel?

Chapter 237, F. S., provides for financial accounts and expenditures of school funds, which shall be disbursed only for public school purposes. (§9, Art. XII, State Const.; AGO 064-55, Biennial Report of the

Attorney General, 1963-1964, Apr. 13, 1964). The Supreme Court of Florida has held that:

An adequate public school program now contemplates the development of skills that flow from the head, the hand, the heart. It must offer training in the laws of health, sanitation, dietetics, and recreation, . . . Expenditures for facilities that aid these purposes may be lawfully made from the public school funds. . . . (Taylor v. Board of Public Instruction of Lafayette Co., 26 So.2d 181 (1946)).

Accordingly, athletic fields, gymnasiums and bus sheds have been held to be necessary to an adequate public school plant and essential to the conduct of the county school system. (*Id.*). In declaring outmoded the notion that education should concern itself solely with the three R's, the Supreme Court of Florida said:

. . . Competitive sports are now a recognized part of the public school program. Eminent psychologists proclaim the doctrine that competitive sports contribute more to one's personality quotient and ability to work with people than any other school activity. Athletic coaches and physical directors tell us that the Olympic Games and other forms of physical competition have done more to put an end to class hatreds and promote international harmony than the United Nations Assembly. . . . (Scott v. Board of Public Instruction of Alachua Co., 35 So.2d 579, 581 (1948)).

Here the court permitted the purchase of lands outside the county limits by the school board for recreational purposes. Boards of public instruction are authorized to contract for personal services so long as those services are utilized ". . . [I]n and about the operation or maintenance of the public schools, when appropriate to carry out the plan or system provided for by law. . . ." (Board of Public Instruction of Okaloosa Co. v. Kennedy, 147 So. 250, 251 (1933)).

To provide for a sense of uniformity and enhance the dignity of the educational atmosphere, the following have been deemed legal expenditures of school funds: An allowance of gasoline money to a group of high school boys for transportation to a basketball practice (AGO 041-86, Biennial Report of the Attorney General, 1941-1942, Feb. 26, 1941); the purchase of uniforms for a school band (AGO 047-387, Biennial Report of the Attorney General, 1947-1948, Nov. 17, 1947); and participation in the educational section of the Florida exhibit at the New York World's Fair (AGO 064-55, Biennial Report of the Attorney General, 1963-1964, Apr. 13, 1964). "Uniforms," as contemplated here, mean dress of a same kind or appearance by which members may be recognized as belonging to a particular body, as opposed to plain clothes or ordinary civil dress (State v. Thobe, 191 N.E.2d 182 (1961)). So long as the uniforms are purchased and used in accordance with the laws requiring school funds to be disbursed only for school purposes, there should be no prohibition to the contemplated purchases. Accordingly, questions 1 and 2 are answered in the affirmative.

068-91—August 5, 1968

STATE FIRE MARSHAL

SCOPE OF JURISDICTION AND AUTHORITY TO ENFORCE
LAWS PROVIDING FIRE PREVENTION AND CONTROL;
BUILDINGS USED FOR COMMERCIAL PURPOSES, ETC.*To: Broward Williams, State Treasurer, Tallahassee*

QUESTION:

Does the state fire marshal have jurisdiction to enforce all laws relating to the several matters set forth in §633.01, F. S., with reference to the following occupancies?

1. Hotels and motels
2. Restaurants
3. Office buildings
4. Mercantile stores of all types
5. Theaters
6. Manufacturing plants of all types
7. Apartments
8. Condominia
9. Retail and wholesale gasoline distributors

Section 633.01, F. S., designates the State Treasurer and ex officio Insurance Commissioner as State Fire Marshal, and states that he:

... [S]hall enforce all laws and provisions of this chapter relating to:

- (1) Prevention of fires;
- (2) Storage, sale, use, keeping, manufacture, handling, transportation or other disposition of combustibles, explosives, flammables, gunpowder, carbide, and crude petroleum or any of its products and may prescribe the material or receptacles and building to be used for such purpose;
- (3) Installation and maintenance of fire alarm systems and fire-extinguishing equipment;
- (4) Servicing, recharging, marking, and tagging of portable fire extinguishers and shall provide standards of operation for those engaged in such activities;
- (5) Construction, maintenance, and regulation of fire escapes;
- (6) The means and adequacy of exits from all buildings in event of fire;
- (7) Suppression of arson and the investigation of fires; and
- (8) Transportation of radioactive materials intrastate by private carrier, and may prescribe the handling and storage procedures during such transportation and the marking of vehicles engaged in such transportation.

The enforcement authority of the State Fire Marshal as stated in §633.01, F. S., is conjunctive: he is to enforce "all laws" relating to the 8 above listed matters, and he is to enforce the "provisions" of Ch. 633, F. S., relative to said matters. The legislative intent is clear.

The State Fire Marshal is authorized and empowered by §633.081, F. S., to inspect "all buildings" within his jurisdiction and to fashion

such orders as are necessary with respect to the several matters of concern expressed in the statute.

Section 633.01, F. S., requires the state fire marshal to enforce "all laws" relating to fire prevention, the handling of flammables and explosives, fire alarm systems and fire-extinguishing equipment, fire escapes, fire exits, the suppression of arson, and the handling of radioactive materials. Sections 633.05 and 633.081, F. S., vest in him extensive powers to promulgate rules and regulations of statewide effect and to conduct inspections. Municipal fire chiefs, and mayors of municipalities without organized fire departments are made ex officio deputy fire marshals by §633.121, F. S., and structures within their official purview are subject to the enforcement powers of the state fire marshal.

The authority of the State Fire Marshal under §633.01, F. S., is express, and his jurisdiction is comprehensive of "all laws" on the subject.

068-92—August 6, 1968

JUNIOR COLLEGES

CONDUCT OF ADULT EDUCATION CLASSES—HIGH SCHOOL COURSES LEADING TO DIPLOMA

To: *Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee*

QUESTION:

Is a junior college prohibited from offering any adult education classes which will lead to the awarding of a high school diploma or the equivalent thereto?

State junior colleges, in addition to providing a course of study which parallels that of the first 2 years of colleges and universities, are set up to offer courses to adults for the furtherance of their education. (§228.041(1)(b), F. S.) I am advised that it is a long-standing practice and the current policy of several junior colleges to provide such programs for adults as a service to their respective communities. After a careful examination of applicable statutes, I am unable to find any provision which prohibits junior colleges from offering adult education classes leading to the awarding of a high school diploma or its equivalent. Your question is answered in the negative.

068-93—August 6, 1968

TAXATION—ASSESSMENT

EXTENSION OF TAXES ON CURRENT TAX ROLLS WITH OUTSTANDING COUNTY TAX SALES CERTIFICATES—CONSTRUCTION OF §193.63, F. S.

To: *Troy E. Moody, County Tax Collector, Vero Beach*

QUESTION:

Are county tax assessors authorized to extend taxes on lands for which there are outstanding county tax sales certificates?

Section 193.63, F. S., required the tax assessor, when preparing and extending the 1967 tax roll, to enter a description of all lands in the county upon which taxes had been sold to the county and to enter the valuation of such lands on the roll, and to mark against such lands on such roll the words, "county tax certificate," but the statute commands him not to extend the taxes upon such lands. This section further provides that the valuation of such tax delinquent lands is not to be considered when calculating millages required to be levied. This section was originally derived from Section 1, Ch. 6158, Laws of Florida, 1911, when there was a state ad valorem tax against real property in this state, and when tax sales certificates were issued to the state instead of the counties. Prior to the enactment of said Ch. 6158, the practice of attaching subsequent and omitted tax assessments to the outstanding tax sale certificate was not followed, resulting in the issuance of successive tax sales certificates encumbering the same parcel of land for successive years.

Current statutes provide that taxes are not to be extended on tax delinquent lands held by the counties and that such taxes are to be attached to the outstanding tax sale certificate to be sold or redeemed with and when the outstanding tax certificate is sold or redeemed. Under this practice, taxes subsequently assessed against the same lands, where there is an outstanding county tax sale certificate, accumulate as a part of the said outstanding tax sale certificate, instead of being extended on the tax roll and having subsequent tax sales certificates issued encumbering the same. In the light of §193.63, F. S., the Indian River County Tax Assessor was not authorized to refuse to follow §193.63, F. S., and extend the taxes on his tax roll when county-owned tax sales certificates were outstanding and unredeemed which encumbered the property taxed, instead of following the requirements of §193.63, F. S. The procedure for tax sale certificate lands, when the tax sale certificate is held by a county, is that provided for by §193.63, F. S., which should have been followed in this case.

Section 193.26, F. S., provides that "[t]he county assessors of taxes in this state shall receive no compensation for assessing lands which are not subject to taxation." This poses the question whether a tax assessor, when complying with §193.63, F. S., may extend and assess taxes on the tax roll and, further, whether there may be an assessment of taxes without the extension of a tax on the tax roll. Does a tax assessor make an assessment of property when, in conformity with §193.63, F. S., he describes the parcel of property, fixes its valuation, and marks against the property description "county tax certificate," but does not extend any taxes against the property described or make an assessment of property, especially when such valuation may not be taken into consideration by the board of county commissioners and the county school board when calculating millages to be levied?

The Supreme Court of Florida, in *Hiers v. Mitchell*, 95 Fla. 345, 116 So. 81, text 85, held "A tax is an enforced contribution of money or other property, assessed in accordance with some reasonable rule or apportionment by authority of a sovereign state on persons or property within its jurisdiction for the purpose of defraying the public expenses. . . ." (Emphasis supplied.) A tax assessor, when complying with §193.63, F. S., levies no tax on the property described; however, §193.63, F. S., imposes the tax which is due and payable when the tax sale certificate is purchased or redeemed, to be determined and added to the amount due under the tax certificate by

the Clerk of the Circuit Court. The compensation of the tax assessor's office is a percentage of the taxes levied by the tax assessor as provided in and by §193.65, F. S. The duties required of tax assessors by §193.63, F. S., where there is an outstanding county held tax sale certificate encumbering the property, do not amount to a tax assessment under and pursuant to said §193.65, F. S. The tax assessor was not authorized to extend taxes on those lands for which an outstanding county tax sale certificate was outstanding. Section 193.63, F. S., provided the procedure in such cases, which does not include the extension of taxes when there is an outstanding county tax sale certificate.

068-94—August 7, 1968

PUBLIC OFFICERS

SUSPENSION FOR INCOMPETENCY—JUDGES OF COUNTY CRIMINAL COURTS OF RECORD

To: *Claude R. Kirk, Jr., Governor, Tallahassee*

QUESTION:

Does §15, Art. IV, State Const., authorize the governor to suspend the judge of the Dade County Criminal Court of Record for incompetency?

Section 15, Art. IV, State Const., authorizes the governor to suspend any officer, appointed or elected, who is not liable to impeachment (as determined by reference to the inclusions and exclusions of §29, Art. III, State Const.) for any of the following reasons and on the following grounds only: "... [M]alfeasance, or misfeasance, or neglect of duty in office, for the commission of any felony, or for drunkenness or incompetency, . . ."

A Judge of the Criminal Court of Dade County is an officer by the terms and within the meaning of §15, Art. IV, State Const. See §9, Art. V, State Const., and §32.01, F. S. Your question is answered in the affirmative.

068-95—August 12, 1968

TAXATION

ASSESSMENT OF LANDS ZONED AGRICULTURAL; DUTIES AND PROCEDURES OF TAXING OFFICIALS

To: *Fred O. Dickinson, Jr., State Comptroller, Tallahassee*

QUESTIONS:

1. Do the provisions of §193.201, F. S., make it mandatory for the county commissioners to zone those agricultural lands for which a return has been filed and which return establishes that said lands are actually used for agricultural purposes, when such lands at the time the return is filed are zoned for other purposes?

2. If question 1 is answered in the affirmative, are such lands required to retain such agricultural zoning classification until the owner files a petition for zoning, pursuant to other applicable provisions of the county zoning law?

Question 1 is answered in the affirmative. Section 193.201, F. S., establishes:

... [I]n each county an agricultural zoning board ... comprised of the board of county commissioners, as voting members, and the county tax assessor and county agent sitting as nonvoting ex officio members. ... [which] board, in order to promote and assist a more orderly growth and expansion of urban and metropolitan areas, shall on an annual basis zone all lands within the county as either agricultural or non-agricultural. ... No lands shall be zoned as agricultural lands unless a return is made as required by law [Section 193.12, Florida Statutes] which shall state that said lands on January 1 of that year were used primarily for agricultural purposes, and the board, before so zoning said lands, may require the taxpayer or his representative to furnish the board such information as may reasonably be required to establish that said lands were actually used for a bona fide agricultural purpose. All lands which are used primarily for bona fide agricultural purposes shall be zoned agricultural. ...

Initially we point out that the zoning contemplated by §193.201, F. S., is totally separate and distinct from zoning for other purposes. That zoning of agricultural lands under §193.201, F. S., is for purposes of taxation only and should not be confused with laws dealing with the zoning of certain areas within municipalities as well as rural areas. The purpose of the latter type zoning is to stabilize the use, and conserve the value of property; to conserve the character of the neighborhoods of the municipality, and to promote the health, safety and welfare of the community. (101 C.J.S., 665-670, §2; 58 Am. Jur. 940 and 941, §1.) For instance, see Ch. 19539, Laws of Florida, 1939, now appearing as Ch. 176, F. S., which established municipal zoning of real properties within incorporated municipalities, for the purpose of regulating buildings and structures to be constructed within municipal limits. (Also see Ch. 333, F. S.) The same lands may be subject to zoning for purposes of taxation under §193.201, F. S., and subject to zoning for general zoning purposes under Ch. 176, F. S., and other similar statutes and laws.

Your question contemplates that a return has been filed which establishes that said lands are actually used for agricultural purposes. Once it has been established that the lands are in fact used for bona fide agricultural purposes it is mandatory that such lands be assessed accordingly.

As to question 2, we reemphasize the fact that the zoning under §193.201, F. S., has nothing whatsoever to do with other applicable local zoning laws. Zoning under §193.201, F. S., contemplates the filing of a return stating that said lands on January 1 of that year were used primarily for agricultural purposes. (See §193.201(3), F. S.) This would be somewhat similar to the filing of a claim for homestead tax exemption. We emphasize the language "January 1 of that year" since this clearly contemplates the filing of a return in each year. Once §193.201, F. S., has been complied with such lands would continue to be so classified until such lands were diverted to another use or ceased to be used for agricultural purposes (see §193.201(4)(a), F. S.), or until the land is reclassified by the board as provided for in §193.201(4)(b), F. S., which provides: "The board may also reclassify lands zoned as agricultural as nonagricultural when there is contiguous

urban or metropolitan development on two or more sides and when the board finds that the continued use of such lands for agricultural purposes will act as a deterrent to the timely and orderly expansion of the community." This answers question 2.

In view of the fact that this is the initial opinion considering §193.201, F. S., we will discuss the law briefly in the interest of providing guidelines for the administration of the law. The words "zone" and "zoning" as applied to agricultural and nonagricultural lands by §193.201, F. S., as amended by Section 1, Ch. 67-117, Laws of Florida, 1967, seem to contemplate the division of lands, for the purposes of taxation, into agricultural and nonagricultural lands. For the purposes of said §193.201, F. S., "agricultural lands" include "horticulture, floriculture, viticulture, forestry, dairy, livestock, poultry, bee, pisciculture" lands when such lands are used "principally for the production of tropical fish and all forms of farm products and farm production."

Section 193.11(3), F. S., which also relates to the taxation of lands used for agricultural purposes, defines lands used for agricultural purposes as including "... only lands being used in bona fide farming, pasture, grove and forestry operations by the lessee or owner, or some person in their employ." Under this section "lands which have not been used for agricultural purposes" in prior years are prima facie subject to taxation on the same basis as assessed for the previous year and any demand for the assessment of such lands as agricultural lands "... shall be subject to the severest scrutiny of the county tax assessor to the end that the lands shall be classified properly." Said §193.11(3), F. S., is used here not as the applicable law but as an aid in construing §193.201, F. S., above-mentioned.

Agriculture has been said to be the art or science of cultivating the ground including the harvesting of crops and rearing and management of livestock; tillage, husbandry, farming; or in a broader sense, the art of the production of plants and animals useful to man. (3 Words and Phrases, 23-24.) See also Florida Industrial Commission v. Growers Equipment Co., 152 Fla. 595, 12 So.2d 889, text 893, for definition of agriculture generally. Section 193.201, F. S., contemplates bona fide farming operations and usually a person is not considered to be a farmer unless he uses his land in some of the usually recognized ways of farming. He must produce more than a few vegetables on a backyard lot. The mere fact that a person owns and resides on a farm does not ipso facto make him a farmer. (35 C.J.S. 955-957.) Section 193.201, F. S., contemplates agriculture as one's ordinary or principal occupation—not as a mere avocation such as the production of vegetables on a backyard lot.

When the agricultural zoning board, created and established by §193.201, F. S., has zoned all the taxable lands within the county, either as agricultural lands or nonagricultural lands, it becomes the duty and obligation of the county assessor of taxes to determine and fix the "just valuation" of such properties for purposes of taxation, as contemplated by §1, Art. IX, State Const.

Section 193.201(6), F. S., sets out the factors to be considered by tax assessors when fixing the value of agricultural lands for purposes of ad valorem taxation.

The Sup. Ct. of Fla. in *Tyson v. Lanier*, Fla. 156 So.2d 833, said that the just valuation of agricultural lands was to be determined "from their bona fide use as such farming, pasture, grove and forestry operations . . . and not their value for collateral and other unlimited purposes, not of an agricultural nature." In *Markham v. Blount*, Fla.,

175 So.2d 526, the court, construing then §193.021, F. S., said that where agricultural lands are involved, "the agricultural factor must be taken into account as the only factor in each instance." This being true, present §193.201(6), F. S., and paragraphs numbered (a)-(g), should be construed as being limited to agricultural purposes.

The Sup. Ct. of Fla. in *City of Tampa v. Colgan*, 121 Fla. 218, 163 So. 577, text 582, remarked that "... Prospective value (of taxable properties) alone cannot be made the substantive basis of an assessment, but can be considered to the extent that it enters into, or is reflected in, present value. . . ." Note 24, A.L.R. 649. To the same effect see 51 Am. Jur. 655 and 656, §706; *Finch v. Grays Harbor County*, 121 Wash. 486, 209 P. 833; *Northern P. R. Co. v. Benton County*, 87 Wash. 534, 151 P. 1123; under these authorities the fact that a property would have more value if used for another purpose may not be used for an increased valuation. Where prospective value presently is reflected in or enters into the present value of real property, so that it is a present and not a prospective value, such value may be used.

For lands to be zoned as agricultural lands for purposes of ad valorem taxation, under §193.201, F. S., there must be a bona fide primary use thereof for agricultural purposes, which use must be established by the landowner or his duly authorized agent. The term "agricultural lands" as used in said statute, contemplates a bona fide use for purposes of "horticulture, floriculture, viticulture, forestry, dairy, livestock, poultry, bee, pisciculture where the land is used primarily for the production of tropical fish, and all forms of farm products and farm production."

The responsibility for showing that such lands are used primarily for a bona fide agricultural operation, to entitle such property to classification as agricultural lands, is placed by the statute on the owner of the lands in question or his duly authorized agent. It is provided in §193.201(3), F. S., that "No lands shall be zoned as agricultural lands unless a [tax] return [thereof] is made as required by law . . ." Such tax return is required to produce sufficient evidence before the tax assessor that the property is being used primarily for a bona fide agricultural operation, to demonstrate its use for such purpose. Lands used for agricultural purposes may be zoned as such, although included in a subdivision plat, so long as their primary bona fide use is for agricultural purposes.

068-96—August 20, 1968

ELECTORS AND ELECTIONS

SPECIAL PRIMARY ELECTIONS—AUTHORITY OF GOVERNOR TO CALL—CONSTRUCTION OF TERM "VACANCY"

To: *Claude R. Kirk, Jr., Governor, Tallahassee*

QUESTION:

Does Ch. 100, F. S., authorize the governor to call a special primary election to effect primary nominations for members of the Alachua County Board of Public Instruction?

The governor does have the authority to call special primary elections under certain circumstances to which §100.111(6)(b), F. S., might be applicable, such as nominations to boards of public instruction.

His authority in this respect is predicated upon a determination that there obtains a "vacancy in . . . nomination . . ." (§100.111(6)(b), F. S.) I direct your attention to the Order of Dismissal entered on July 26, 1968, by Judge Murphree of the Circuit Court in and for Alachua County in the matter of Eugene A. Todd v. John L. Connell *et al.*, No. C-51468. Judge Murphree's ruling, unless reversed on appeal is construed to mean that no vacancy in nomination exists at this time.

068-97—August 28, 1968

ELECTED PUBLIC OFFICIALS

INELIGIBLE FOR INCLUSION IN LIST OF OFFICE EMPLOYEES TO BE COVERED BY WORKMEN'S COMPENSATION LAW

To: Ernest Ellison, Legislative Auditor, Tallahassee

QUESTION:

If an officer elected at the polls is expressly included within the coverage of a workmen's compensation benefit insurance policy procured from a private company, may that portion of the premium applicable to said officer be paid from public funds?

Section 440.02, F. S., defines employment, as covered by said chapter, as including "Employment by the state and all political subdivisions thereof and all public and quasi-public corporations therein; . . ." It is further provided in said section that the term employment "shall not include service performed by or as: . . . officers elected at the polls; . . ." Section 440.04(3), F. S. provides that:

When any policy or contract of insurance specifically secures the benefits of this chapter to any person not included in the definition of "employee" or whose services are not included in the definition of "employment" or who is otherwise excluded or exempted from the operation of this chapter, the acceptance of such policy or contract of insurance by the insured and the writing of same by the carrier shall constitute a waiver of such exclusion or exemption and an acceptance of the provisions of this chapter with respect to such person, notwithstanding the provision of §440.05 with respect to notice.

This subsection relates to the policy of insurance substituted for and in lieu of the employer under and pursuant to §§440.41 and 440.42, F. S., and does not appear to have been intended to impose any liability on the state or its agency, as employer, for the insurance premiums that may arise by reason of an erroneous classification of an officer elected at the polls as being within the operation of the Workmen's Compensation Law. Officers elected at the polls are excluded from Ch. 440, F. S., as employees within the purview and operation of the act, whenever the circumstances and conditions mentioned in §440.04(3), F. S., occur, so that the insurance carrier becomes bound by reason thereof.

We find nothing in the statute which would appear to cancel the erroneous insurance arising from the coverage of an "officer elected at the polls." Neither do we find in the statutes any evidence of a legislative intention to impose the premium for the insurance against

the public, notwithstanding its payment erroneously from public funds. Said §440.04(3), F. S., appears to be in the nature of an estoppel against the insurer who issues a policy purporting to cover an officer elected at the polls, from denying that such policy is an outstanding and enforceable one, as between the insurer and the insured. This estoppel does not appear to run against the state and its counties, districts, municipalities, etc., but seems to be limited to the insured and the carrier. Section 22, Art. III, State Const., provides, "Provision may be made by general law for bringing suit against the State as to all liabilities now existing or hereafter originating." Section 4, Art. IX, State Const., provides "No money shall be drawn from the Treasury except in pursuance of appropriations made by law."

Neither the employing agency, the employee, the insurance carrier, nor any of them, in the light of the above and foregoing, has authority to bind the state and its political subdivisions for insurance premiums, by including an "officer elected at the polls" in their list of employees under the Workmen's Compensation Law. Your question is answered in the negative, notwithstanding said §440.04(3), F. S. In this connection and to the same effect, see also AGO's 049-201, Biennial Report of the Attorney General, 1949-1950, May 6, 1949, pp. 436 and 437; 053-4, Biennial Report of the Attorney General, 1953-1954, Jan. 5, 1953, pp. 477 and 478; 058-152, Biennial Report of the Attorney General, 1957-1958, May 6, 1958, pp. 674-676.

068-98—August 28, 1968

TAXATION

MILLAGE ROLLBACK PROVISIONS INAPPLICABLE TO TAXING DISTRICTS CREATED SUBSEQUENT TO ENACTMENT

To: *Fred O. Dickinson, Jr., State Comptroller, Tallahassee*

QUESTION:

Is the millage imposed by the creation of a county free library, pursuant to Ch. 150, F. S., subject to the rollback provisions contained in §§193.03 and 193.031, F. S., when the library is established subsequent to the year in which the rollback actually occurred?

Your question is answered in the negative. Sections 193.03 and 193.031, F. S., are not applicable. Section 193.03(1), F. S., provides:

After the assessment rolls have been prepared on the basis required by law, the board of county commissioners and the board of public instruction and all other governing boards or governing authorities of all other taxing districts, within the counties including municipalities, whose taxes are assessed on the tax roll prepared by the county assessor, shall reduce the millage to be levied by *each such governing authority* from what it was in the preceding year proportionate to the increase of the general level of assessed value over the preceding year. Provided, however, if in preparing its proposed budget for the year in which the reduction of millage is required *such budget making authority* determines that the millage required for operating funds should be increased no more than ten per cent more than the millage determined in subsection (6)

of this section it shall proceed as follows: . . . (Emphasis supplied.)

As we review said subsection and indeed §193.03, F. S., in general, the purpose was to prevent an injustice to the taxpayers resulting from the possibility of being placed in the position of being required to pay taxes in substantially greater amounts in the year of revaluation than had been paid in the year immediately preceding the year of revaluation. In *Lewis v. Mosley*, Fla., 204 So.2d 197, the court stated at p. 201: "The purpose of the 'roll-back' statutes (St. 193.03 and St. 193.032) was to 'prevent an injustice to the taxpayer when a general re-evaluation of property is made within a county and the tax roll is thereby increased.' . . ." Also see *Board of Public Instruction of Hendry Co. v. State*, Fla., 188 So.2d 337, wherein the court stated at p. 342: ". . . The scope and aim of §193.03 is to prevent an injustice to the taxpayer when a general re-evaluation of property is made within a county and the tax roll is thereby increased; . . ."

If a particular parcel of property was placed on the tax rolls at a value of \$10,000 in the year prior to revaluation, and if this \$10,000 was 50% of just value, then in the year of revaluation the property would be placed on the tax rolls at \$20,000. The rollback law merely requires that the millage be reduced proportionately. If the millage had been 5 mills in the year prior to revaluation it must be reduced to 2.5 mills in the year of revaluation, thus theoretically producing the same amount of tax (The Homestead tax exemption provision would affect this somewhat.) thus injustice to the taxpayer is prevented.

Section 193.03, F. S., applies to and affects only those millages in taxing units, districts, counties, etc., in existence at that time and not those which were not in existence at that time.

In AGO 066-70, Biennial Report of the Attorney General, 1965-1966, July 12, 1966, p. 337, I answered the following question in the negative: "Where there is no *existing* general level of increased valuation in a district subsequent to Jan. 1, 1964, does the roll back provision of §193.03, F. S., apply?" (Emphasis supplied.) In doing so I relied on AGO 064-124, Biennial Report of the Attorney General, 1963-1964, Sept. 2, p. 429, which delved briefly into the history of §193.03, F. S. The title of Ch. 63-250, Laws of Florida, which amended Ch. 193, F. S., provides in part:

AN ACT relating to tax assessments and tax sales; amending Chapter 193, Florida Statutes, by adding Section 193.021; providing a basis upon which real and personal property shall be assessed; amending Sections 193.06, 193.11(1),(2), 193.12, 193.13, 193.22, and 192.31(1), Florida Statutes, to conform to the basis provided in Section 193.021; amending Section 193.03, Florida Statutes, providing for *reduction of millage when assessed valuation is increased*; . . . (Emphasis supplied.)

By using this as a guide to legislative intent it seems clear that a reduction of millage is required when assessed valuation is increased. It seems equally clear and logical that only that which is in existence is capable of being reduced. The millage which is to be ultimately reduced can only be that millage of the various budget-making authorities in existence at the time of revaluation. The language of §193.03(1), F. S., requires the Board of County Commissioners, the Board of Public Instruction, and all other governing boards or gov-

erning authorities of all other taxing districts to reduce the millage to be levied by each such governing authority.

I presume that the legislature had knowledge of and was referring to any existing governing authorities of taxing districts. Those which were not yet in existence, either because they had not yet been created by legislative action, or because they had not yet been established through the use of existing permissive legislative authority (for example Chs. 150, 378 and 298, F. S.), would not be presumed to be within the knowledge of the legislature. In 82 C.J.S. p. 541, it is stated:

It is also presumed that the legislature had, and acted with respect to, full knowledge and information as to the subject matter of the statute and the existing conditions and relevant facts relating thereto, as to *prior and existing law and legislation on the subject of the statute and the existing condition thereof*, as to the judicial decisions with respect to such *prior and existing law and legislation*, . . . (Emphasis supplied.)

Consequently, I presume the legislature had knowledge of existing law and conditions, it is entirely logical to presume that the legislature had reference in §193.03, F. S., to the various governing boards and budget making authorities referred to therein which had previously been established either by or pursuant to existing law. Since this is so, it is only logical that the reduction of millages referred to in §193.03, can only have reference to the millages of existing governing boards and budget making authorities, and not to millages of governing boards and budget making authorities yet to be created. This being so, then the millages referred to in §193.03, and the increases authorized therein by said section can only have reference to those millages of existing governing boards and budget making authorities. The same is true for §193.031, F. S. The legislature, in §193.031(1), F. S., commences by referring to ". . . a millage reduction under the provisions of §193.03 . . .". Again, that which was not in existence could not have been reduced. Therefore, it could not be limited by §193.031, F. S. The references found in §193.031, F. S., to "each budget making authority" can only have reference to existing budget making authorities of which the legislature can be presumed to have had knowledge. Therefore, your question is answered in the negative as to both §§193.03 and 193.031, F. S., if that which is established pursuant to Ch. 150, F. S. is a budget making authority as defined in AGO 064-129, Biennial Report of the Attorney General, 1963-1964, Sept. 10, 1964, pp. 434-436.

In the case of *Rileigh v. Pinellas County, Fla.*, 200 So.2d 165, the court considered Ch. 150, F. S., and a tax levy made by the Board of County Commissioners of Pinellas County as authorized by said act. Therein the court stated at p. 167: "The Act does not exempt *any property from taxation*; it simply creates a taxing district to be composed of an area within the territorial limits of the county, *less property 'already taxed for library purposes'* . . ." (Emphasis supplied.) Thus, that which is created pursuant to Ch. 150, F. S., is a taxing district. The Board of County Commissioners acting pursuant to §150.08, F. S., would be considered as the budget making authority of said taxing district, since the board exercises the authority to establish a tax levy as well as the authority to establish the necessity for the tax levy. (See AGO 064-129.)

The budget making authority of this taxing district was not in

existence at the time §§193.03 and 193.031, F. S., were enacted, it is not within the purview of said sections. Thus, your question is answered in the negative.

I also point out that the percentage increases referred to in §§193.03 and 193.031, F. S., relate to each budget making authority individually. The statutes do not impose a maximum percentage increase on the aggregate of all millages levied by such budget making authorities. See §§193.03(1), (1)(b), (3), (3)(c), 193.031(2) and (3), F. S., wherein the legislature refers to "such budget making authority" and "each budget making authority."

It is presumed that taxing officials will perform their duties and obligations faithfully within the confines of the law. I further point out that which is stated in §150.08(2), F. S.:

All funds of the county free library, whether derived from taxation or otherwise, shall constitute a separate fund to be known as the *county free library fund*, and shall be expended only for library purposes. The expenses incurred by the county library board shall be paid by warrants drawn by the board of county commissioners, payable out of county free library fund. (Emphasis supplied.)

The situation posed by your question contemplates a county presently levying less than 10 mills where the proposed additional levy will not result in exceeding 10 mills. Chapters 67-395 and 67-396, Laws of Florida, are neither considered nor passed on.

068-99—August 29, 1968

BANKS AND BANKING

CONSTRUCTION OF §§659.085(1) AND 659.17(4), F. S.— RECONCILIATION—PURCHASE BY BANK OF ITS OWN CAPITAL STOCK—CONDITIONAL

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

Is §659.085(1), F. S. (Ch. 67-582, Laws of Florida), in conflict with §659.17(4), F. S.?

I will use Ch. 67-582, Laws of Florida, instead of §659.085(1), F. S., as my basis for analysis in this opinion. The title to said act provides:

AN ACT relating to banks and banking; amending section 659.08, Florida Statutes, by adding subsection (4); providing for bank or trust company employee stock option plans; requiring approval by commissioner; authorizing the acquisition and holding by banks and trust companies of certain amounts of its authorized capital stock for the issuance of stock options to officers and employees and authorizing the granting of stock options and the sale of stock pursuant thereto; authorizing board of directors to set price of stock within limits of statute; providing an effective date. (Emphasis supplied.)

This title refers to the providing for bank or trust company employee stock option plans. It refers to authorizing banks and trust companies to acquire and hold certain amounts of its authorized

capital stock for the issuance of stock options to officers and employees, and to authorizing the granting of stock options and the sale of stock pursuant thereto. It contains no reference to any blanket authorization for banks or trust companies to acquire and hold their own capital stock. It refers only to acquiring and holding capital stock for the stated purpose of the issuance of stock options to officers and employees. The only reference found in the title to any existing law or part thereof is the reference to §659.08, F. S. Section 659.17(4), F. S., is not referred to.

Section 1, Ch. 67-582, Laws of Florida, provides in part:

For the stated purpose of providing stock options for one or more of its officers or employees, any bank or trust company, . . . may hold unissued from the amount of any authorized increase in its capital (other than an increase authorized solely for the purpose of declaring and paying a stock dividend), or purchase or otherwise acquire and hold, shares of its own common capital stock in an aggregate par value amount not to exceed at any one time ten per cent (10%) of the par value of its total authorized common capital stock, . . . (Emphasis supplied.)

As I review the language of said section, it authorizes any bank or trust company, after certain conditions are met, to "1. Hold unissued from the amount of any authorized increase in its capital (other than an increase authorized solely for the purpose of declaring and paying a stock dividend) or 2. Purchase or 3. Otherwise acquire and hold" shares of its own common capital stock in an aggregate par value amount not to exceed at any one time 10% of the par value of its total authorized common capital stock upon certain conditions being complied with.

This holding, purchasing, or otherwise acquiring can only be done for the stated purpose of providing stock options for one or more of its officers or employees. There is no blanket authorization for the holding or purchasing or otherwise acquiring and holding of the banks or trust companies own common capital stock.

Section 659.17, F. S., deals with the subject of loans. Section 659.17(4)(a), F. S., provides in part: "No loan or discount shall be made by a bank or trust company on the security of the *shares of its own capital stock nor* may a bank or trust company *be the purchaser of any of such shares, . . .*" (Emphasis supplied.) The language "such shares," has reference to shares of its own capital stock. Thus Ch. 67-582, Laws of Florida, authorizes a bank or trust company to purchase shares of its own common capital stock in a limited amount for the sole stated purpose of providing stock options for one or more of its officers or employees after first complying with certain conditions set forth in the act. Section 659.17(4)(a), F. S., authorizes a bank to purchase shares of its own capital stock when certain conditions exist. Each contemplates its own sphere of circumstances and conditions.

Chapter 67-582, Laws of Florida, contains no express reference to §659.17(4)(a), F. S., nor does it contain any general repealing clause. However, it is the later expression of the legislature.

In 82 C.J.S., p. 477, it is stated: "A statute or a provision thereof may be repealed by implication as effectively as by an express repeal. . . . An implied repeal is one which takes place when a new law contains provisions which are contrary to, but do not expressly repeal,

those of a former law." However, the repeal of statutes by implication is not favored.

In 82 C.J.S., p. 491, it is stated: "The general rule that a statute prevails over and impliedly repeals a prior inconsistent one to the extent of the repugnancy applies where both statutes relate to the same subject." Chapter 67-582, Laws of Florida, relates to the general subject of officer and employee stock options, while §659.17, F. S., relates to the general subject of state bank loans. Both, however, deal with the topic of banks purchasing shares of their own stock under certain conditions. I feel that each may be given a separate sphere of operation thus preserving the integrity of both provisions of the law. This may be accomplished by holding that when a bank or trust company is establishing employee stock option plans it may purchase and hold its own common capital stock subject to the limitations and conditions set forth in Ch. 67-582, Laws of Florida. Section 659.17(4) (a), F. S., should be viewed as allowing a bank or trust company to purchase its own capital stock only when "... such ... purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, and stock so purchased or acquired shall within six months from the time of its purchase be sold or disposed of at public or private sale." Under either statute then a bank would be authorized to purchase shares of its own capital stock upon the conditions set forth in either of the two statutes.

Construing these provisions in this manner avoids repeal by implication which is not favored and adheres to the rule as stated in 82 C.J.S., pp. 492 and 493: "The rule that, in case of repugnancy or conflict between two legislative acts, the later one prevails and repeals the earlier one by implication applies *where* the conflict, repugnancy, or inconsistency is *clear, plain, manifest, and irreconcilable*, or, as sometimes stated, where it is *absolute, invincible, and material*, and the two acts *cannot be harmonized or both cannot stand, operate, or be given effect at the same time.*" (Emphasis supplied.) The two laws can be reconciled and both can stand alone. Thus, your question is answered in the negative.

068-100—August 29, 1968

DOG AND HORSE RACING

MAXIMUM NUMBER OF DAYS OPERATION PER YEAR AUTHORIZED INCLUDING SCHOLARSHIP AND CHARITY DAYS

To: Carey Matthews, Chairman, Legislative Subcommittee on Pari-mutuel Affairs, Miami

QUESTION:

May a Florida greyhound track, or permittee, operate for more than 105 days, plus scholarship or charity days (Sundays excepted), during the calendar year?

Although the gallimaufry of racing statutes packaged in Ch. 550, F. S., is a veritable "interpreter's nightmare," *Volusia Jai Alai, Inc., v. McKay* (Fla. 1956), 90 So.2d 334, cited in *State ex rel Volusia Jai Alai, Inc., v. Ring* (Fla. 1960), 122 So.2d 4, 6, the 1965 Legislature summarized and spotlighted the statutory purport in §550.291, F. S.

Stated cogently by the Supreme Court of Florida, §550.291, F. S.

(Ch. 65-435, Laws of Florida) "commands that the . . . [Racing Commission] grant no more than one hundred five days of operation to any one greyhound, harness or jai alai permittee." State *ex rel* Associated Outdoor Clubs, Inc., v. Lechner (Fla. 1967), 197 So.2d 512, 513. The statute also establishes a minimum of 90 days per permittee, and allows charity or scholarship days to be granted in addition to the minimum or maximum racing dates set out therein.

The legislature addressed itself exclusively to greyhound racing dates in §550.083, F. S. (Ch. 61-509, Laws of Florida). Therein, pre-1961 statutes were qualified, summarized and clarified by the authorization of dog racing, permittees—exclusive of certain North Florida permittees, geographically described—to race "at any time" of their choosing "during the calendar year," for the total number of days "fixed and permitted by law," and subject to Racing Commission "approval."

The Commission's approval power under §550.083, F. S., with respect to permittees' selection of racing dates within a given calendar year, has been statutorily explicated by §550.291, F. S., in terms of allocation by the Commission of the particular racing dates within the 90-day minimum/105-day maximum parameters. That allocation is performable "annually," that is, yearly, 3 Words and Phrases, p. 683 (Perm. Ed.), comporting with the calendar year context within which racing dates are establishable. *Fretwell v. McLemore*, 52 Ala. 124, 145; *Wheran v. Helis* (La. App.) 152 So.2d 220, 226; 45 Words and Phrases, pp. 644, 645 (Perm. Ed.). Your question is answered in the negative.

068-101—September 5, 1968

TAXATION

IMPOSITION OF AD VALOREM TAXES BY MUNICIPALITIES— CONSTRUCTION OF CH. 67-396, LAWS OF FLORIDA, (§167.445, F. S.) IN CONNECTION WITH CH. 27940, LAWS OF FLORIDA, 1951, CHARTER OF CITY OF TRENTON

To: William O. Clifton, City Attorney, Trenton

QUESTION:

Does Section 5, Ch. 67-396, Laws of Florida, now appearing as §167.445, F. S., require that the City of Trenton levy a tax on real and personal property so as to produce tax funds equal to the amount of funds received from the state?

Your question is answered in the negative. The city charter [Ch. 27940, Laws of Florida, 1951] provides in Section 15 as follows: "The city of Trenton shall have the right to raise by taxes such amounts as may be necessary for carrying on the government of the city not to exceed twenty mills on the dollar, of the fair cash value of all real and personal property located within the city of Trenton, . . ." There are other provisions in the charter pertaining to tax assessment and collection which are not necessary to determine the question being raised at this time. I realize that the city is now limited to a levy of 10 mills and that the assessed valuation on the city roll cannot exceed the value on the county roll. The problem here is that the City of Trenton has not caused a tax assessment roll to be prepared or levied

any taxes on real or personal property within the past 10 years or more. Some of the taxpayers feel that the preparation of a tax roll by the city is a useless act, unless the city intends to levy a millage or taxes as authorized by the city charter.

Section 5, Ch. 67-396, Laws of Florida, provides:

The comptroller of the state of Florida is hereby directed to determine each year whether the several municipalities of this state are assessing the real and tangible personal property within their jurisdiction in accordance with law. If the comptroller determines that any municipality is assessing property *at less than that prescribed by law*, the comptroller shall withhold from such municipality a portion of any state funds to which that municipality may be entitled equal to the difference of the amount assessed and the amount required to be assessed by law. (Emphasis supplied.)

This section was construed in AGO 068-46, Biennial Report of the Attorney General, 1967-1968. In this opinion I stated: "If municipal tax assessing officers are assessing properties for municipal taxation on this basis (fair market value) then their assessments are 'in accordance with law.'" Your question presupposes a situation where the city does not need to impose property taxes since it already has sufficient moneys for the operation of the city, such moneys coming from other sources.

Section 1, Art. IX, State Const., insofar as taxation of real and tangible personal property is concerned, requires that: "The Legislature shall provide for a uniform and equal rate of taxation, . . . and shall prescribe such regulations as shall secure a just valuation . . . excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious or charitable purposes."

Section 5, Art. IX, State Const., provides that: "The Legislature shall authorize the several counties and incorporated cities or towns in the State to assess and impose taxes for county and municipal purposes, and for no other purposes, and all property shall be taxed upon the principles established for State taxation. . . ." and that the legislature may also provide for levying "a tax on licenses."

In the preparation of the county budget for the coming fiscal year Ch. 129, F. S., requires that the board of county commissioners, acting as a budget board, first prepare its spending budget covering the costs and expenses of the operation of the county (but not including the county school board) for the coming fiscal year; second, determine the estimated receipts of the county from sources other than ad valorem taxes (including balances to be carried over from current year), license taxes coming to the county and other expected income of the county; third, subtract from the total amount of the spending budgets the said estimated receipts to determine the amount or amounts to be raised by ad valorem taxation, which amount should represent 95% of the amount to be raised by ad valorem taxation (§129.01(2)(b), F. S.). Most, if not all municipal legislative charters, contain similar provisions regulating the fiscal and budgetary operations of such municipal corporations. Municipalities incorporated under and pursuant to Ch. 165, F. S., would follow similar procedure for carrying out their fiscal and taxing duties and requirements.

Municipalities, whether operating under legislative charter provisions or under general corporate statutes and laws, are required, when preparing their spending budgets and carrying out their fiscal

requirements, to estimate the sources of their income, for the coming fiscal year, from sources other than ad valorem taxes, including balances carried over from the current fiscal year, and moneys to be derived from license taxes and taxes other than ad valorem taxes, the total of which is to be subtracted from the operating budget for the coming fiscal year, in order to determine the amount or amounts to be raised by ad valorem taxation. This amount, when calculating taxes to be raised by taxation, should, unless otherwise provided in the municipality's legislative charter, be taken and considered as 95% of the amount to be raised by ad valorem taxation. This 5% difference between the amount to be raised by taxation and the amount of the budget, is provided on the basis of tax collections not exceeding 95% of the tax levy.

The statutes of the state, and doubtless ordinances of the municipal corporations of this state, or most of them, contemplate that the taxing authorities (counties, districts and municipalities) when determining the millage to be levied by them for fiscal operation, take into consideration the fiscal income of the said counties, districts or municipalities, including license and excise taxes, and other income. Such taxes would seem to include license taxes, taxes on utilities levied under §167.431, F. S., cigarette taxes imposed under and pursuant to §210.02, F. S., and perhaps other types of municipal taxes.

The statutes hereinabove considered and examined clearly contemplate that if the income of a municipal corporation, not imposed for some special benefit or special purpose, is sufficient to meet its budget for its coming fiscal year, the levy of ad valorem taxes is not contemplated or required by the law. Ad valorem taxes are provided for the purpose of meeting municipal general obligations not otherwise provided for by law.

Section 5, Art. IX, State Const., does not require the assessment and imposition of taxes by the several counties and incorporated cities or towns of the state. However, if such taxes are imposed they must meet the requirements of §1, Art. IX, and §7, Art. X, State Const. (See *City of Naples v. Conboy*, Fla., 182 So.2d 412; *State v. Atkinson*, Fla. App., 170 So.2d 455, and AGO 068-46, Biennial Report of the Attorney General, 1967-1968.)

The case of *Consolidated Naval Stores Co. v. Hendry*, 30 So.2d 617, dealt at length with the budgeting process. Said case, although dealing with a county and not a city, clearly points out that if the taxing unit has sufficient moneys to operate that unit from sources other than ad valorem sources, then ad valorem taxes are not required. In said case it is stated at p. 618:

The estimate of revenue and receipts so required is made by the Clerk of the Circuit Court each year and filed with the Board of County Commissioners, preliminary to preparing the county budget. The Superintendent of Public Instruction, on or before July 15th of each year, makes up a similar budget of available balances and requirements of the Board of Public Instruction for the ensuing year and files it with the Board of County Commissioners. With this information in hand it is the duty of the County Commissioners to determine the amount of funds necessary for all County purposes (Section 193.31, Florida Statutes Annotated) and when they have done this, they are required to deduct the sum of the revenue and receipts found available from the amount found necessary for all county purposes and then impose an ad valorem tax on

all taxable property in the County to raise the balance found necessary to supply the needs of the County government. (Emphasis supplied.)

Said case also points out that in estimating for the county budget, the county commissioners may anticipate that 95% of all ad valorem taxes extended on the tax rolls will be paid.

068-102—September 13, 1968

INDUSTRIAL COMMISSION—JUDGES

EXEMPTION FROM CH. 110, F. S., STATE PERSONNEL BOARD— TERM OF EMPLOYMENT—LEAVE REGULATIONS

To: *Patrick H. Mears, General Counsel, Florida Industrial Commission,
Tallahassee*

QUESTIONS:

1. Are judges of industrial claims, who are appointed by the commission with the approval of the governor for terms of 4 years pursuant to §440.45, F. S., 1967, exempt from the provisions of Ch. 110, F. S., 1967, by reason of §110.051(2) thereof, which provides that the exempt positions which shall not be covered by this chapter shall include judges?

2. Does a judge of industrial claims earn annual leave and sick leave under the Attendance and Leave section of the Personnel Rules and Regulations of the State Personnel Board, and, if so, when he vacates his position by resignation or upon expiration of his term is he entitled to be paid for his unused annual leave as of the date of separation as provided in Section 1.7, D 2, thereof?

3. When a judge of industrial claims resigns before the expiration of the term of 4 years for which he has been appointed may his successor be appointed for a full term of 4 years or must he be appointed for the unexpired term?

4. If judges of industrial claims are exempt from the provisions of Ch. 67-437, Laws of Florida, and of the Personnel Rules and Regulations of the State Personnel Board, may the Florida Industrial Commission adopt similar attendance and leave regulations for these judges, including provision for payment for unused annual leave at the time of separation from state service or death?

AS TO QUESTION 1:

The question is whether judges of industrial claims are 'judges' as intended by §110.051(2), F. S. Unfortunately, it helps little to observe that the problem is largely definitional in character, for we are then constrained to choose without guide among Aristotelian, conventional, operational or functional definitions, among others. Therefore, the most obvious answer is the one which the circumstances warrant.

First, Chapter 67-544, Laws of Florida [amending Ch. 440, F. S.], a 1967 enactment, designates the former deputy commissioners as judges. The same legislature, by Ch. 67-437, Laws of Florida [amending Ch. 110, F. S.] created the State Personnel Board and, by Section 5 thereof, exempted judges (and referees and receivers) from its operation. Second, the appellation 'judge' is compatible with the functions

of the position, "which is somewhat analogous to that of a Chancellor . . .," U.S. Casualty Co. v. Maryland Casualty Co. (Fla., 1951) 55 So.2d 741, p. 744, and the Florida Industrial Commission, of which these judges are functionaries is invested with judicial power as declared by §1, Art. V, State Const. Thirdly, you inform me that the judges of industrial claims (as deputy commissioners) have in fact been exempted all along from the merit system pursuant to Rule 215-1.07 of the Merit System Regulations, which rules and regulations subsist until specifically supplanted. Chapter 67-437, Section 2(1), Laws of Florida (§110.021(1), F. S.).

In fine, it must be inferred that the 1967 Legislature which created the positions of judges of industrial claims and which also exempted judges from the operation of Ch. 110, F. S., acted with knowledge of the subsisting exemption of deputy commissioners from the merit system in light of the quasi-judicial character of these positions, as aforesaid. Indeed, legislative intent is, by general acceptance, gatherable from discrete enactments upon the same subject. *Peninsular Industrial Insurance Co. v. State* (1911) 61 Fla. 376, 55 So. 398. Question 1 is answered in the affirmative.

AS TO QUESTION 2:

The answer must necessarily be controlled by my answer to question 1. Judges of industrial claims are exempt from the personnel rules and regulations of the State Personnel Board under Ch. 67-437, Section 5, Laws of Florida, even as they were apparently exempt, as deputy commissioners, from the merit system under Rule 215-1.07. Hence, question 2 must (without consideration of the second independent clause therein) be answered in the negative.

AS TO QUESTION 3:

Section 440.45(1) and (2), F. S., empowers the Florida Industrial Commission to appoint and employ judges of industrial claims (not to exceed 21 in number). Each judge is "appointed for a term of four years," and on its face no lesser terms are envisaged by the statute nor is the commission obviously authorized to make any appointment for a lesser period.

This notion—that appointment to the position is for the period specified by the statute and not merely for such lesser period as remains in an unexpired term—accords with the general rule applicable to appointments to vacated offices. 43 Am. Jur., Public Officers, §159; 67 C.J.S., Officers, §§46, 53.

But, judges of industrial claims are employed by the industrial commission, for a 4-year term, subject to severance for "cause" and assignable—in terms of geographic location and professional duties—as the commission sees fit. As quasi-judicial administrative functionaries, judges of industrial claims are more nearly employees than officers. See *In re Opinion of the Justices* (Fla., 1935) 163 So. 76; *State ex rel. Holloway v. Sheats* (Fla., 1910) 83 So. 508, for the distinction. Surely, then, the commission may appoint and employ said judges for 4 years, as provided by statute. For if officers are, by the general rule, each appointable for 4-year terms no matter when they take office, then a fortiori the commission as employer may adhere to the plain wording of §440.45(2), F. S., by employing judges of industrial claims for 4 years. Parenthetically, the limiting provision of §14, Art. V, State Const., an 1885 provision pertaining to "the office of judge," is, by every historical and epistemological test, not controlling of appointments of judges of industrial claims. The positions, judges of industrial claims, were created as such 82 years after—

ward and could not have been contemplated by said constitutional provision; and said positions are probably not offices.

Your question is answered as follows. Because judges of industrial claims occupy no fixed geographical jurisdiction and their duties are assignable by the commission, §440.45(5), F. S., there are strictly speaking no successors in office or employment. When a judge of industrial claims resigns before the expiration of the term of 4 years for which he was appointed and employed, the industrial commission may appoint and employ another such judge for a term of 4 years as per §440.45(2), F. S.

AS TO QUESTION 4:

Chapter 440, F. S., provides no authority for commission promulgation of a body of personnel rules and regulations applicable to judges of industrial claims. In fact, §440.44(4), F. S., explicitly excludes said judges from any classificatory schedules, standards, rules or regulations so promulgated by the commission for its employees.

068-103—September 23, 1968

CRIMES

TEAR GAS GUN, TEAR GAS PEN OR CHEMICAL; CARRYING CONCEALED—CONSTRUCTION OF §790.01, F. S.

To: *Marvin U. Mounts, Jr., County Solicitor, West Palm Beach*

QUESTION:

Do the Florida Statutes prohibit the carrying of concealed tear gas pens and other devices which spray a chemical that upon contact renders a person temporarily helpless or incapacitated without great bodily harm?

Section 790.01, F. S., pertaining to the carrying of concealed weapons provides in part as follows: "Whoever shall secretly carry arms of any kind on or about his person, or whoever shall have concealed on or about his person any dirk, pistol, metallic knuckles, sling shot, billie or other weapon, except a common pocket knife, shall be guilty of a misdemeanor. . ." The prohibition against secretly carrying "arms" of any kind on or about the person appears to have reference to those weapons usually employed in civilized warfare such as guns, swords, bayonets, etc. The "or other weapon" following the prohibited enumerated items of dirk, pistol, metallic knuckles, sling shot, and billie would appear to be governed by the ejusdem generis rule which means of the same kind, class, or nature.

Section 790.03, F. S., provides for indictments and informations against those persons carrying any pistol, razor, dirk or other deadly weapon. Section 784.04, F. S., provides that whoever assaults another with a deadly weapon, without intent to kill, shall be guilty of aggravated assault. It would appear that "deadly weapon" as used in these statutes is a weapon that is likely to produce death or great bodily injury. See *Goswick v. State*, 143 So.2d 817; *Dey v. State*, 182 So.2d 266; and *Blitch v. State*, 194 So.2d 1.

Attorney General's Opinion 68-022 Ohio, of Jan. 25, 1968, has ruled in a similar case that a tear gas gun or other device that sprays a chemical which upon contact renders a person temporarily helpless or incapacitated for a short period of time without causing great bodily harm is not a dangerous weapon within the meaning of §2923.01

of the Ohio Revised Code which provides that "no person shall carry a pistol, Bowie knife, dirk or other dangerous weapon concealed on or about his person . . ."

It therefore appears, after a careful study of the aforesaid statutes that a small tear gas fountain pen, chemical mace and other tear gas dispensing device cannot be considered "arms" as recognized in civilized warfare, neither are they within the enumerated prohibited items nor of the same kind, class and nature. However, if the tear gas fountain pen or other chemical dispensing device is so constructed as being capable of, or adaptable to, firing projectiles in a solid form that are likely to cause death or great bodily injury, it would be prohibited as a deadly weapon. If on the other hand it is designed in such a fashion as to only accommodate the emission of gaseous substances that do not produce death or great bodily harm, it would not come within the statutory prohibitions of §§790.01 and 784.04, F. S. Your question is answered in the negative on the condition that chemicals used in the devices under consideration are nonlethal and do not produce great bodily harm. Any informal or formal opinions of this office inconsistent herewith are to the extent of any inconsistency superseded and withdrawn.

068-104—October 22, 1968

BEVERAGE DEPARTMENT

OFFICERS—ARREST POWERS, CONSTRUCTION OF §901.15, F. S., RELATIVE TO ARREST BY PEACE OFFICER WITHOUT WARRANT

To: Paul Antinori, Jr., State Attorney, Tampa

QUESTION:

Does a State Beverage Department officer have the lawful authority to arrest a patron of licensed premises for any misdemeanor committed by such patron on such premises in the presence of such officer even though such misdemeanor does not involve a violation of any beverage law?

In *Boynton v. State*, 64 So.2d 536, text 549, the Sup. Ct. of Fla. said:

. . . There can be no denial of the right and authority of the Beverage officers to enter the licensed premises during business hours for the purpose of inspecting and searching the premises to determine whether or not the Beverage Laws are being violated. It is also true that while in such place of business the officers have the right and authority to arrest any person in such place of business violating any law in their presence and as an incident to such arrest or in connection therewith, they may lawfully search the person of such individual.

And in the same case, text 551:

. . . When the place of business is open during the business hours, any person, except minors, may lawfully enter, and a Beverage Department officer may arrest and search the person of an individual in the place of business if he is violating any law in the presence of such officer. *Sec. 901.15, F.S.* (Emphasis supplied.)

Section 901.15, F. S., authorizes a "peace officer" to arrest a person who has committed a misdemeanor in his presence. When the Supreme Court thus cited said section in support of the statement last above quoted, it necessarily construed the words "peace officer" as including a Beverage Department officer; if this were not so, the Court's reference to §901.15 would be completely meaningless. Therefore, your question is answered in the affirmative.

If there is a valid charge against a defendant in a court which has jurisdiction to try the offense charged, and if such defendant is physically present before the court, it is immaterial that the original arrest was unlawful and the court can proceed to try him and dispose of the case (see *Campbell v. County of Dade*, 113 So.2d 708; *Jones v. State*, 123 So.2d 385; 9 Fla. Jur. 124, Criminal Law, §95; 21 Am. Jur. 2d 401, Criminal Law, §380; and 22 C.J.S. 382-384, Criminal Law, §144).

If the arrest mentioned in your letter had been unlawful (it wasn't), that fact would not bar a prosecution for the offense for which the arrest was made. Of course, if an arrest is illegal, the State cannot use evidence gained as a result of a search incident to such illegal arrest.

068-105—October 24, 1968

TAXATION

MUNICIPAL AD VALOREM TAXES, ASSESSMENT REQUIREMENTS—PROHIBITED EXEMPTIONS

To: *Fred O. Dickinson, Jr., State Comptroller, Tallahassee*

QUESTIONS:

1. Are municipalities in this state required to assess ad valorem taxes for tangible and real personal property when in the course of their activities by charter provision they have never so assessed these properties for tax purposes?

2. Are municipalities in this state required to assess both real and tangible personal property for ad valorem tax purposes when by charter provision one type property is by charter expressly prohibited and exempt from taxation?

Question 1 is answered in AGO 068-101 (this report) wherein I stated: "Section 5, Article IX, of the Florida Constitution, does *not* require the assessment and imposition of taxes by the several counties and incorporated cities or towns of the states." (Emphasis supplied.)

AS TO QUESTION 2:

In the above-quoted opinion I stated: "However, *if* such taxes are imposed they must meet the requirements of Article IX, Section 1, and Article X, Section 7, Florida Constitution. (See *City of Naples v. Conboy*, Fla., 182 So.2d 412; *State v. Atkinson*, Fla. App., 170 So.2d 455, and Attorney General's Opinion 068-46.)" (Emphasis supplied.)

Section 1, Art. IX, of the State Const. provides:

... The Legislature shall provide for a uniform and equal rate of taxation, except that it may provide for special rate or rates on *intangible property*, . . . and shall prescribe such regulations as shall secure a just valuation of *all property, both real and personal*, excepting such property as may be exempted by

law for municipal, education, literary, scientific, religious or charitable purposes. (Emphasis supplied.)

Note that this refers specifically to all property, both real and personal. Note too, that there is a limitation on the exemptions. This means that only property ". . . for municipal, education, literary, scientific, religious or charitable purposes" may be exempted by law. No other property can be exempted by law. The constitution, having specified permissible tax exemptions, has excluded all others. (*Lanier v. Tyson*, Fla., 147 So.2d 365; *Franks v. Davis*, 145 So.2d 228; *Miller v. Doss*, 46 So.2d 888; *State ex rel. Sovereign Comp. W.O.W. v. Bering*, 121 Fla. 781, 164 So. 859.) This constitutional provision is a limitation upon the legislative power to exempt from taxation any classes of property except those particularly specified. (*L. Maxey, Inc. v. Federal Land Bank*, 111 Fla. 116, 150 So. 248 (1933), affirmed 111 Fla. 116, 151 So. 276.)

In AGO 049-409, p. 207, 1949-1950 Biennial Report of the Attorney General, my predecessor in office Attorney General Richard W. Ervin, answered the following question: "Under what principles may a municipality in this state grant exemptions from taxation to real property held in private ownership?" Said question was answered as follows:

. . . [U]nless the development in question is to be used for some municipal, educational, literary, scientific, religious or charitable purpose, it *cannot be granted exemption from taxation*. In this connection, the rules applicable to the county tax assessor would seem to also be applicable to the municipal tax assessor. . . (Emphasis supplied.)

In the case of *City of Naples v. Conboy*, Fla., 182 So.2d 412, wherein the Court considered the question of the power of a city to afford tax benefits to a private concern, therein the Court stated at pp. 415 and 416:

. . . There is no question as to the good faith of the taxing authority, but the *danger of allowing such power of exemption* to exist is so manifest that our Constitution, Article IX, §1 and §5 *prohibits the exercise of such power*. The chancellor buttressed his decision that the contract was void as being ultra vires by also holding, in effect, that §§1 and 5 of Article IX, Constitution of Florida, prohibit such tax advantages flowing to individuals. The chancellor was eminently correct in holding that such discrimination in favor of the appellants would violate §1, Article IX of the Constitution. (Emphasis supplied.)

Therefore, §1, Art. IX, of the State Const. is applicable to municipalities and is a limitation on the power of municipalities to exempt property from taxation. (Also see *State v. Atkinson*, Fla. App. 170 So.2d 455.)

068-106—October 25, 1968

TAXATION

FLORIDA SALES TAX—APPLICATION TO FEDERAL CREDIT UNIONS

To: J. Ed Straughn, Director, State Revenue Commission, Tallahassee

QUESTION:

Are Federal credit unions exempt from the Florida Sales and Use Tax imposed by Ch. 212, F. S., on their purchases?

Your question is answered in the affirmative. Your letter states:

On June 17, 1968, the United States Supreme Court, in the case of *First Agricultural National Bank v. State Bank Commission*, — U.S. —, 20 L.Ed.2d 1138, — S.Ct. —, held that national banks are exempt from both the Massachusetts sales and use tax on their *purchases* of tangible personal property for their own use. The court held that legislative history and prior decisions of the court make it clear that 12 U.S.C. §548 marks the outer limits within which states may tax national banks. (Emphasis supplied.)

You refer us to §1768, Title 12, United States Code. Said section provides:

The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from *all taxation* now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that *any real property and any tangible personal property* of such Federal credit unions shall be subject to Federal, State, Territorial, and local *taxation to the same extent as other similar property is taxed*. Nothing herein contained shall prevent holdings in any Federal credit union organized hereunder from being included in the valuation of the personal property of the owners or holders thereof in assessing taxes imposed by authority of the State or political subdivision thereof in which the Federal credit union is located; but the duty or burden of collecting or enforcing the payment of such a tax shall not be imposed upon any such Federal credit union and the tax shall not exceed the rate of taxes imposed upon holdings in domestic credit unions. (Emphasis supplied.)

In the *Agricultural National Bank* case the taxable status of national banks is raised. In said case it is stated: "... Because of pertinent congressional legislation in the banking field, we find it unnecessary to reach the constitutional question of whether today national banks should be considered nontaxable as federal instrumentalities. . ."

The Court then considered Title 12, U.S.C.A. §548, which stated in part:

... "The legislature of each state *may* determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. *The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income.* . . .

1.(a) *The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others.* . . .

* * * * *

3. *Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.*" (Emphasis supplied.)

The Court then stated:

... For purposes of this case, the most important piece of banking legislation is 12 U.S.C. §548 which originated as part of the Act of June 3, 1864, c. 106, §41, 13 Stat. 111. *This section allows state taxation of national banks in any one of four specified ways in addition to taxes on their real estate.* . . (Emphasis supplied.)

It concluded by holding that the State of Massachusetts could not impose its sales tax on the national banks since not authorized by Federal laws.

We then turn to Title 12 U.S.C. §1768, previously quoted herein. Said section makes the Federal credit unions, their property, their franchises, capital, reserves, surpluses, and other funds, and their income exempt from all taxation now or hereafter imposed ". . . by the United States or by any State, Territorial, or local taxing authority; . . ." It excepts therefrom any real property and tangible personal property and provides that such property shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. As we view said section it refers to direct taxes. No provision is made therein for allowing the imposition of the sales tax. However, this does not answer the question because (1) the Agricultural bank case clearly stated that that Court would make its own determination as to whether the tax was a tax on the buyer or on the seller, and (2) that case did not deal with indirect taxes.

In that case the Court rejected the decision of the Massachusetts Supreme Court to the effect that the tax was on the vendor. It stated:

... There can be no doubt from the clear wording of the statute that the Massachusetts Legislature intended for this *sales tax to be passed on to the purchaser*. For our purposes, at least, *that intent* is controlling. And it seems clear to us that the force of the law, especially the language in subsection 3, is such that regardless of sanctions, businessmen will attempt, in their everyday commercial affairs, to conform to its provisions as written. . . (Emphasis supplied.)

* * * * *

Subsection 3 of the Massachusetts sales tax provides:

"Reimbursement for the tax hereby imposed shall be paid by the purchaser to the vendor and each vendor in this commonwealth shall add to the sales price and shall collect from the purchaser the full amount of the tax imposed by this section, or an amount equal as nearly as possible or practicable to the average equivalent thereof; and such tax shall be a debt from the purchaser to the vendor, when so added to the sales price, and shall be recoverable at law in the same manner as other debts." St. 1966, c. 14, §1, subsec. 3.

The Court said:

This subsection reads to us as a clear requirement that the sales tax be passed on to the purchaser. And this interpretation is reinforced by subsection 23 which *prohibits* as unlawful *advertising the holding out by any vendor that he will assume or absorb the tax on any sale that he may make.* . . (Emphasis supplied.)

Section 212.07(1), F. S. provides: . . . "The privilege tax herein levied measured by retail sales shall be collected by the dealers *from the purchaser or consumer.*" (Emphasis supplied.)

Section 212.07(2), F. S., provides:

. . . Dealers shall, as far as practicable, add the amounts of the tax imposed under this chapter to the sale price and the tax shall be separately stated as Florida tax on any charge tickets, sales slips, invoices or other tangible evidence of sale, and such tax shall constitute a part of such price, charge or proof of sale which shall be a debt from the purchaser or consumer to the dealer, until paid, and shall be recoverable at law in the same manner as other debts. Any dealer who shall neglect, fail or refuse to collect the tax herein provided upon any, every and all retail sales made by him or his agents or employees of tangible personal property which is subject to the tax imposed by this chapter shall be liable for and pay the tax himself. (Emphasis supplied.)

Section 212.07(4), F. S., provides in part:

A dealer engaged in any business taxable under this chapter shall not advertise or hold out to the public, in any manner, directly or indirectly, that he will absorb all or any part of the tax, or that he will relieve the purchaser of the payment of all or any part of the tax, or that the tax will not be added to the selling price of the property sold or released or when added that it or any part thereof will be refunded either directly or indirectly by any method whatsoever. . . . (Emphasis supplied.)

There can be no doubt but that the clear language of Ch. 212, F. S., requires that the tax be passed on to the purchaser. This brings the Florida Sales Tax squarely within the language of the Agricultural bank case.

Therefore, Federal credit unions would be exempt from the Florida Sales and Use Tax even though the Florida Supreme Court has held that this tax is a tax on the vendor. (See *Green v. Panama City Housing Authority*, 110 So.2d 490 and 115 So.2d 560, and *Ryder Truck Rental, Inc. v. Bryant*, 170 So.2d 822.)

Attorney General's Opinion 066-82, 1965-1966 Biennial Report of the Attorney General, Aug. 11, 1966, has been considered. The rationale expressed there is consistent with that expressed in the instant opinion, although that opinion dealt with intangible taxes.

068-107—December 12, 1968

CRIMINAL LAW

ATTORNEY FEE ALLOWABLE TO COURT APPOINTED FOR REPRESENTING INSOLVENT DEFENDANT ON APPEAL FROM FELONY CONVICTION—CONSTRUCTION OF §27.53(2), F. S.

To: Joseph O. Macbeth, Assistant State Attorney, Sebring

QUESTION:

If an appeal was taken by an insolvent defendant from his felony conviction, and the Public Defender was permitted to withdraw as counsel for such defendant on appeal, and another attorney not associated with the Public Defender was appointed

by the court to represent such defendant on his appeal and did so represent him, does §27.53(2), F. S., authorize the trial judge to allow an attorney's fee for the services of such appointed attorney on appeal to be paid by the county?

Section 27.53(2), F. S., reads as follows:

(2) In addition, *any member of the bar in good standing may be appointed by the court or may register his or her availability to the public defender of each judicial circuit for acceptance of special assignments without salary to represent insolvent defendants. Such persons shall be listed and referred to as special assistant public defenders and be paid a fee; such fee shall be fixed by the trial judge and shall be paid in the same manner as counsel fees are paid in capital cases or as otherwise provided by law.* In addition, defense counsel may be assigned and paid pursuant to any existing or future local act or general act of local application. (Emphasis supplied.)

Said statutory provision clearly provides for compensation for an attorney, not associated with the public defender, who is appointed to represent an insolvent defendant in the trial court in a felony case. (My own conclusion on this point is in line with the opinion of the Dist. Ct. of App. for the 1st Dist. in *Mildred Gant v. State*, handed down on Nov. 26, 1968, and not yet reported.) Does said statutory provision also authorize compensation for an attorney appointed to represent such a defendant on direct appeal from his conviction? It appears to be designed to authorize the court to appoint a lawyer and to allow him compensation in every situation in which it is ordinarily the duty of the public defender to represent the defendant, (except those situations covered by the hereinafter mentioned §27.53(3), F. S., which applies when two or more indigent defendants have a conflict of interest). Is it ordinarily the duty of a public defender to represent an insolvent defendant on any appeal which may be taken from his conviction for a felony?

Sections 27.51(1) and 27.52, F. S., taken together, provide that the public defender shall represent any person determined by the court to be insolvent, "who is under arrest for, or is charged with, a felony." This does not suggest that it is the duty of the public defender to represent any insolvent defendant on appeal from a felony conviction. However, the legislature has recognized that such duty does devolve upon the public defender by enacting §27.51(4), F. S., in 1967, reading in pertinent part as follows: "(4) The public defenders for the judicial circuits enumerated below may, if requested by any public defender within the appellate district shown, *handle all appeals* to the state and federal courts required of the official making such request: . . ." (Emphasis supplied.) Moreover, it appears that an appeal is a continuation of the original action and not the commencement of a new one. We quote from *Smith v. State*, 192 So.2d 346, 349: "An appeal is the continuation of the original action and is not the commencement of a new action. *Southern Title Research Company v. King*, Fla.App. 1966, 186 So.2d 539; *State ex rel. Andreu v. Canfield*, 1898, 40 Fla. 36, 23 So. 591, 42 L.R.A. 72. . . ."

Since an appeal from a conviction is merely a continuation of the criminal case which commenced in the trial court, it follows that the public defender would ordinarily be under the duty to represent an insolvent defendant in any appeal that might be taken from his conviction for a felony, unless permitted by the court to withdraw. This would be true under the foregoing quotation from the *Smith* case even

if there were no §27.51(4), F. S., and I think that the two, considered together, clearly lead to the conclusion that such duty does rest upon the public defender. Section 27.53(2), F. S., contemplates the appointment of an attorney to perform duties which would ordinarily be performed by the public defender, and said statutory provision provides that an attorney so appointed shall be listed and referred to as "special assistant public defender," my conclusion is that the trial judge may allow an attorney's fee to an attorney so appointed to represent an insolvent defendant on an appeal from his felony conviction.

Said §27.53(2), F. S., requires that any fee payable thereunder shall be paid in the same manner as counsel fees are paid in capital cases or as otherwise provided by law. Consequently, if there is no special act of the legislature governing the situation, then such fee is to be paid in accordance with §909.21, F. S., which governs the allowance and payment of compensation for counsel appointed for insolvent defendants in capital cases and which provides that the allowance shall be paid by the county in which the crime was committed. Hence, any attorney's fee allowable under §27.53(2), F. S., is to be paid by the county if there is no special act governing the matter. Therefore, your question is answered in the affirmative. [It is to be noted that the foregoing observations do not deal with counsel appointed under Section 27.53(3), Florida Statutes, which authorizes the appointment of counsel when the public defender is not in position to serve because of the conflicting interests of two or more indigent defendants.]

068-108—December 16, 1968

GOVERNOR

AUTHORITY TO APPOINT LIEUTENANT GOVERNOR PURSUANT TO §2, ART. IV, STATE CONST.

To: *Claude R. Kirk, Jr., Governor, Tallahassee*

QUESTION:

Does the governor have the authority to appoint a lieutenant governor upon the effective date of the recent revision of the State Constitution as adopted by the electorate on Nov. 5, 1968?

The 1968 Constitution of Florida (as I shall hereinafter designate our 1885 Constitution as it has been recently revised) authorizes the governor in a triad of categorical provisions:

First, §2, Art. IV, of the 1968 Constitution provides for and creates the office of lieutenant governor.

Secondly, §3, Art. X, of the 1968 Constitution declares that a "vacancy in office shall occur upon the creation of an office, . . ."

Finally, §1(f), Art. IV, of the 1968 Constitution requires that "When not otherwise provided for in this constitution, the governor shall fill by appointment any vacancy in state . . . office . . ."

The most obvious question which then obtrudes is: Does this Constitution otherwise provide for the filling of the vacancy in the office of lieutenant governor, which vacancy obtains on the effective date of the 1968 Constitution? The answer is an equally obvious "no."

My research indicates a host of judicial authority for the proposition that a vacancy in office obtains upon the creation of that office by statutory or constitutional provision. Opinions of Justices: 49 Fla. 269, 39 So. 63; 68 Fla. 560, 66 So. 1003; 76 Fla. 649, 80 So. 519 and 520; Advisory Opinions: 78 Fla. 5, 82 So. 612 and 613; 85 Fla. 505, 97 So.

127; 94 Fla. 896, 114 So. 889 and 890; 159 Fla. 464, 31 So.2d 854, 855 and 856; 42 So.2d 170, 171 and 172; 96 So.2d 541, 544 and 545; Gray v. Bryant, Fla., 125 So.2d 846, 854 and 855.

The courts have in this respect staunchly upheld the power of gubernatorial appointment to the vacant office. See *State ex rel Weeks v. Day*, 14 Fla. 9, upholding the governor's power to fill a vacancy in the office of lieutenant governor under the 1968 Constitution; *Gray v. Bryant*, 125 So.2d 846, *inter alia*.

The clear meaning of the 1968 Constitution is, as stated, that you as governor have the authority to appoint a lieutenant governor upon the effective date of the 1968 Constitution (Jan. 7, 1969, as provided in §4, Art. XVII, of the State Const. of 1885, as amended) to serve according to the provisions of §1(f), Art. IV, Constitution of 1968. It is to be presumed that had the legislature desired to vitiate the governor's plainly stated appointive power in respect to the first lieutenant governor, it would have manifested that intention in Art. IV of the 1968 Constitution, which it did not, or it would have made provision in the Constitution's rather detailed schedule, which it did not.

In view of the importance of and public interest in this issue, it may be that an expression from the Supreme Court of Florida would be desirable. If you should request an advisory opinion or if you desire the assistance of the office of Attorney General in any way to submit the matter to judicial determination and to represent in those proceedings the opinion which I have rendered herein, I would be pleased to do so upon your request.

068-109—December 20, 1968

TAXATION

COUNTY AGRICULTURAL ZONING BOARD—REVIEW OF BOARD'S DECISION—§193.201, F. S.

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

What is the proper manner of review of decisions of the county agricultural zoning boards established by Ch. 67-117, Laws of Florida, now found in §193.201, F. S.?

Your question stems from a controversy as to whether or not the board of equalization has the power to hear and reconsider decisions of the county agricultural zoning board.

The agricultural zoning board is comprised of the board of county commissioners, as voting members, and the county tax assessor and county agent sitting as nonvoting *ex officio* members. (See §193.201(1), F. S.) The board, commonly referred to as the board of equalization, is comprised of the board of county commissioners. (See §§193.25 and 193.27, F. S.)

An examination of Ch. 67-117, Laws of Florida, now found in §193.201, F. S., reveals no procedure established to allow aggrieved taxpayers to present testimony or other evidence in support of their position as to the status of their lands as being agricultural or nonagricultural. Section 193.25, F. S., does provide for such a procedure, allowing aggrieved taxpayers to present testimony in support of their position as to valuation. However, §193.201(3), F. S., does allow the agricultural zoning board to require the taxpayer to furnish additional information.

With these facts in mind, we will proceed to the first question which is to determine the nature of the determination reached by the agricultural zoning board.

In the case of *Harris v. Goff*, Fla., 151 So.2d 642, the First Dist. Ct. of App. considered a related question. At p. 643, the Court stated:

This interlocutory appeal presents for our decision the single question as to the proper method of obtaining judicial review of a county zoning resolution or ordinance.

The complaint in this case alleges that *after public hearing* appellant board adopted a resolution rezoning a parcel of land in Duval County, changing the use classification from rural to business. Appellees objected to the adoption of the resolution at the public hearing held by the Board, and its subsequent petition for rehearing on the board's action was denied. The public hearing was held pursuant to published notice, *but no witnesses were sworn, no testimony was taken, no evidence was adduced and no record of the proceedings was made.* . . . (Emphasis supplied.)

(The zoning referred to in this case is not agricultural zoning.)

After exhausting their administrative remedies suit was brought in circuit court. The statute involved provided that any aggrieved person could apply to the circuit court of the county for relief. The board moved to dismiss the complaint "*on the ground that the only proper method for reviewing the board's action is by certiorari, and that appellees' attempt to assault the board's action in a direct proceeding brought in equity for injunction is unauthorized.* . . ." (Emphasis supplied.) The Court relied on the Supreme Court case of *De Groot v. Sheffield* (Fla. 1957) 95 So.2d 912, and the case of *Bloomfield v. Mayo*, 119 So.2d 417. In referring to the *De Groot* case the Court stated at p. 643:

. . . It is there held that *where the statute under which the board or agency purports to act requires notice and hearing, and the judgment of the board is contingent on the showing made at the hearing, then its judgment becomes judicial or quasi-judicial in character.* It was there held that the decision of the board in that case was reached only after a full hearing pursuant to notice based on evidence submitted in accordance with the statute involved. A record of the proceedings was made which was susceptible of review by the court in certiorari proceedings. . . (Emphasis supplied.)

In referring to the *Bloomfield* case, the Court stated at p. 644:

In the *Bloomfield* case this court was confronted with a similar problem regarding the appropriate method of reviewing the action of an administrative agency. In that case we held that *before an administrative order may be considered quasi-judicial in character and therefore subject to review by certiorari, the statute authorizing the entry of such an order must also require that the administrative agency give due notice of a hearing to be held on the question to be considered, and provide a fair opportunity to be heard in a proceeding in which the party affected is accorded the basic requirements of due process of law.* Such requirements must afford the affected party the opportunity of being present in person and by counsel, to present evidence in support of his position and

to cross-examine adverse witnesses whose testimony is offered at the hearing. If the board, agency or commission intends to insist that its ruling or order to be entered upon the showing made at the hearing be reviewed *only by certiorari*, the obligation rests upon the board or agency to see that a *proper record of the entire proceeding is made*, which record shall include its ultimate findings and conclusions. In *De Groot, supra*, we were reminded that certiorari is a discretionary writ bringing up for review by the appellate court the record of an inferior tribunal or agency in a *judicial or quasi-judicial proceeding*.

Reverting to Florida Appellate Rule 4.1 we are convinced, and so held in *Bloomfield, supra*, that the review by certiorari of the rulings of commissions and boards as authorized thereby pertains *only to such rulings as have been made in a quasi-judicial proceeding, and which are quasi-judicial in character as distinguished from those which are purely administrative or legislative in character.* . . . (Emphasis supplied.)

In the *Bloomfield* case, *supra*, the Court stated at p. 421:

. . . It seems clear from the decision of the Supreme Court that the *test of a quasi-judicial function* turns on whether or not the statutory tribunal had exercised a statutory power given it to make a decision *having a judicial character or attribute*, and consequent upon some notice or hearing to be had before it as a *condition for the rendition of the particular decision made*. Where an order of an administrative board or commission is *purely administrative or quasi-legislative or quasi-executive in character and quality*, such an order is not capable of being reached or affected by the writ of certiorari unless, as an incident to the arriving at or making of such order by the promulgating authority, a notice and hearing, *judicial in nature, is required by law to be observed as a condition precedent to the commission's or board's exercise of the administrative, quasi-legislative or quasi-executive power comprehended in the terms of the order it attempts to enunciate*. Even so, an administrative, quasi-legislative or quasi-executive order, after it has already been entered, may have a quasi-judicial attribute if capable of being arrived at and provided by law to be declared by the administrative agency after express statutory notice, hearing and consideration of the evidence to be adduced as a basis for the making thereof. . . . (Emphasis supplied.)

An examination of §193.201, F. S., reveals no procedure established providing for a hearing, the presenting of evidence, the taking of testimony, or the opportunity to the affected party of being present in person or by counsel to cross-examine adverse witnesses. Likewise no procedure is established for the preservation of a record. Thus the decision of the agricultural zoning board is not quasi-judicial in nature. Therefore, it is not reviewable by certiorari. I also note and reemphasize that §193.201, F. S., contains no provision establishing a mode of review, to the circuit court or any other court.

We further note that the agricultural zoning board is a county board not a state board, commission, department, or officer. Therefore, for this additional reason Ch. 120, F. S., is not applicable. That is, it is neither quasi-judicial nor an order rendered by an "agency" as defined in Ch. 120. (See Board of Public Instruction of Duval

County v. Sack, Fla., 212 So.2d 819.) In *Graham v. Talton*, Fla., 192 So.2d 324, the Court stated:

From a review of the record, it affirmatively appears that the action of the Zoning Commission here assaulted was *legislative in character*, and emanated from a hearing which bore none of the characteristics of a quasi-judicial proceeding. Under these circumstances certiorari is *not* the proper method of reviewing the order with which petitioners are concerned. The validity of such an order may be questioned *only by an appropriate action brought in the circuit court in which the order is made the subject of a direct attack.* . . . (Emphasis supplied.)

We have decided that the decision of the agricultural zoning board is not quasi-judicial, for the appropriate means of review would be by direct attack in the circuit court. Let us now examine §193.201, F. S., to determine the function of the agricultural zoning board. Its function is to determine the classification of land for taxation purposes as agricultural or nonagricultural. Its purpose or function then is to zone lands for taxation purposes, either as agricultural or non-agricultural lands. However, although its purpose is directly related to taxation it also is allowed to consider urban and metropolitan development and reclassify lands previously zoned as agricultural or nonagricultural ". . .when the board finds that the continued use of such lands for agricultural purposes will act as a deterrent to the timely and orderly expansion of the community." (See §193.201(4)(b), F. S.

I will next determine whether the creation of the agricultural zoning boards has altered in any manner the previously existing power of the board of county commissioners sitting as the board of equalization. I find that it has not.

Section 193.201(3), F. S., expressly requires the filing of a return, as a condition precedent to a taxpayer being allowed to have his lands zoned agricultural. Section 193.12, F. S., contains provisions related to the filing of a return. It also contains the following language:

. . .upon failure to do so the *assessment and valuation* made by the assessing officer or officers shall be deemed and held to be binding upon such owner or other person or corporation interested in such property, *unless complaint is made of such assessment and valuation on the day set for hearing complaints and receiving testimony as to the value of any property, real or personal, as fixed by the county assessor of taxes.* (Emphasis supplied.)

Note that this refers to both assessment and valuation and also that it requires a complaint on the day set for hearing complaints and receiving testimony. This is the procedure under §193.25, F. S., during which the board of county commissioners sits as the board of equalization.

Section 193.201, F. S., (Ch. 67-117, Laws of Florida) contains no indication therein that it was intended to repeal in whole or in part §193.12, F. S., or §193.25, F. S., and indeed by referring specifically to the requirement of a return, said section indicates that these provisions and the procedures contained therein are not altered or repealed in any manner. Similarly, said section contains no language indicating that the powers of the board of equalization are reduced or that the presently existing machinery for reviewing tax assessments were intended to be altered.

In the case of *Stiles v. Brown*, Fla., 182 So.2d 612, the Supreme Court considered a question relating to agricultural lands. Therein the Court stated:

[The gist of the District Court of Appeal's holding is:
A]Property owner who *failed to inform the county tax assessor that his land was being used for bona fide agricultural purposes and failed to appear before a board of equalization to assert such claim, could not challenge in an equity suit the validity of the assessment of the land which was assessed as nonagricultural land in an amount which the landowner did not timely claim exceeded the fair market value of land but which he now claims in his suit is entitled to preferential treatment accorded agricultural lands by §193.11(3), F.S.A.*

The Court there clearly recognized the power of the board of county commissioners sitting as the board of equalization to review claims for preferential treatment as agricultural lands. Therefore, we conclude as follows:

1. Certiorari in either the district court or the circuit court is not the proper manner of reviewing decisions of the agricultural zoning board.

2. The proper manner of reviewing said agricultural zoning board's decision as to classification would be by direct attack in the circuit court of the particular county. A declaratory judgment would seem appropriate although other means of direct review might be equally appropriate.

3. The board of county commissioners sitting as the board of equalization does have the power to review disputes as to assessment, valuation, and classification of lands claimed to be agricultural.

I also refer you to Ch. 67-593, Laws of Florida, which suspends the operation of §193.11(3), F. S., while Ch. 67-117, Laws of Florida (§193.201, F. S.) is in force and effect. Since it may well be that the legislature may wish to reconsider §193.201, F. S., at some future time we point out that this law is totally silent as to dates and times for meetings of the board.

068-110—December 20, 1968

TAXATION

HOMESTEAD EXEMPTION—CONDOMINIUM AND COOPERATIVE APARTMENTS RESIDENTIAL OR FAMILY UNITS—EFFECTIVE DATE

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

Are individual condominium parcels and individual cooperative apartment units (residential or family units) otherwise qualified by ownership and residency as of Jan. 1, 1969, entitled to the \$5,000 homestead exemption for 1969 ad valorem tax purposes?

Your question is answered in the negative for the reasons and upon the grounds hereinafter recited.

Prior to the 1968 constitutional revisions with which we are now concerned, the owners of separate condominium and cooperative apartment units did not have a right to the \$5,000 homestead tax exemption,

and indeed were and are liable for taxes for each tax year on January 1 of each tax year and the lien to the full extent of ad valorem taxes imposed during the tax year attaches to each taxable property as of January 1 of each tax year. (See §§192.04 and 193.11 F. S.; *Simpson v. Hirshberg* (Fla. 1947), 30 So.2d 912; *Jacksonville Expressway Authority v. Milford* (Fla. App. 1959), 115 So.2d 778.)

Section 6, Art. VII State Const., 1968, extends the right and benefit of the \$5,000 homestead tax exemption to the owners of separate condominium parcels and certain cooperative apartment units on and after the effective date thereof. This constitutional provision appears to be self-executing, is not retrospective, and does not require enabling legislation to activate the effect of the benefit granted and extended. (As to the retroactive and self-executing operation of constitutional provisions generally, see 16 C.J.S. (Const. Law) §§40 and 48; *Gray v. Bryant* (Fla. 1960).)

The 1968 revision of the basic constitution in which §6, Art. VII is contained of necessity had to have been accomplished, and proposed and submitted, by the framers thereof under the authority of and the procedure prescribed by §4, Art. XVII, State Const. of 1885, as amended. This latter constitutional provision fixes the effective date of any proposed revision thereunder at noon on the first Tuesday after the first Monday of the January following the general election at which it receives a favorable vote of the electors voting thereon, in the absence of any other effective date being designated in such revision. The 1968 revision does not designate any effective date, and it therefore becomes effective or operative at noon Jan. 7, 1969, see AGO 068-108, Dec. 16, 1968 (this report). That the old (1885) constitution could be changed or revised only in the manner and by the method therein prescribed and that such provisions regulating its own amendment and revision are mandatory. (See *State v. Florida State Improvement Commission* (Fla. 1952), 60 So.2d 747; *State v. Thompson* (Fla. 1935), 163 So. 270; *Gray v. Golden* (Fla. 1956), 89 So.2d 785.)

Although the draftsmen of the 1968 Revised Constitution could have provided that the new homestead tax exemption benefits vest retrospectively to January 1 of the tax year in which the revised constitution is to take effect, they failed so to do and I find no language in the revised constitution indicating that such operation was intended. There is no presumption that a constitutional provision is intended to operate retrospectively, and in fact, it operates prospectively unless the language used clearly indicates that a retroactive operation is intended. (See 16 C.J.S. (Const. Law) §40.) A constitutional provision, like statutes, has not *ex proprio vigore* any force until it becomes the law of the land and that is when, by its terms or by organic law, it takes effect, and it is to be understood as speaking from the time it goes into operation, and not from the time of its adoption or passage. *Neisel v. Moran* (Fla. 1920); also see generally, 16 C.J.S. (Const. Law) §39b.; AGO 067-49, Aug. 10, 1967 (this report). Apart from the foregoing, the new constitution itself provides in §7(b), Art. XII, that the 1968 revision "shall not be retroactive so as to create any right or liability which did not exist under the Constitution of 1885, as amended, . . ." As already noted, no right to the new homestead tax exemption benefits herein considered existed under the Constitution of 1885, as amended, which continues in force as the fundamental or organic law of the state until the effective date of the new constitution.

Under existing constitutional and statutory law the tax year commences on January 1 of each tax year and the so-called tax day is January 1 of each tax year. (See §§192.04 and 193.11, F. S., and

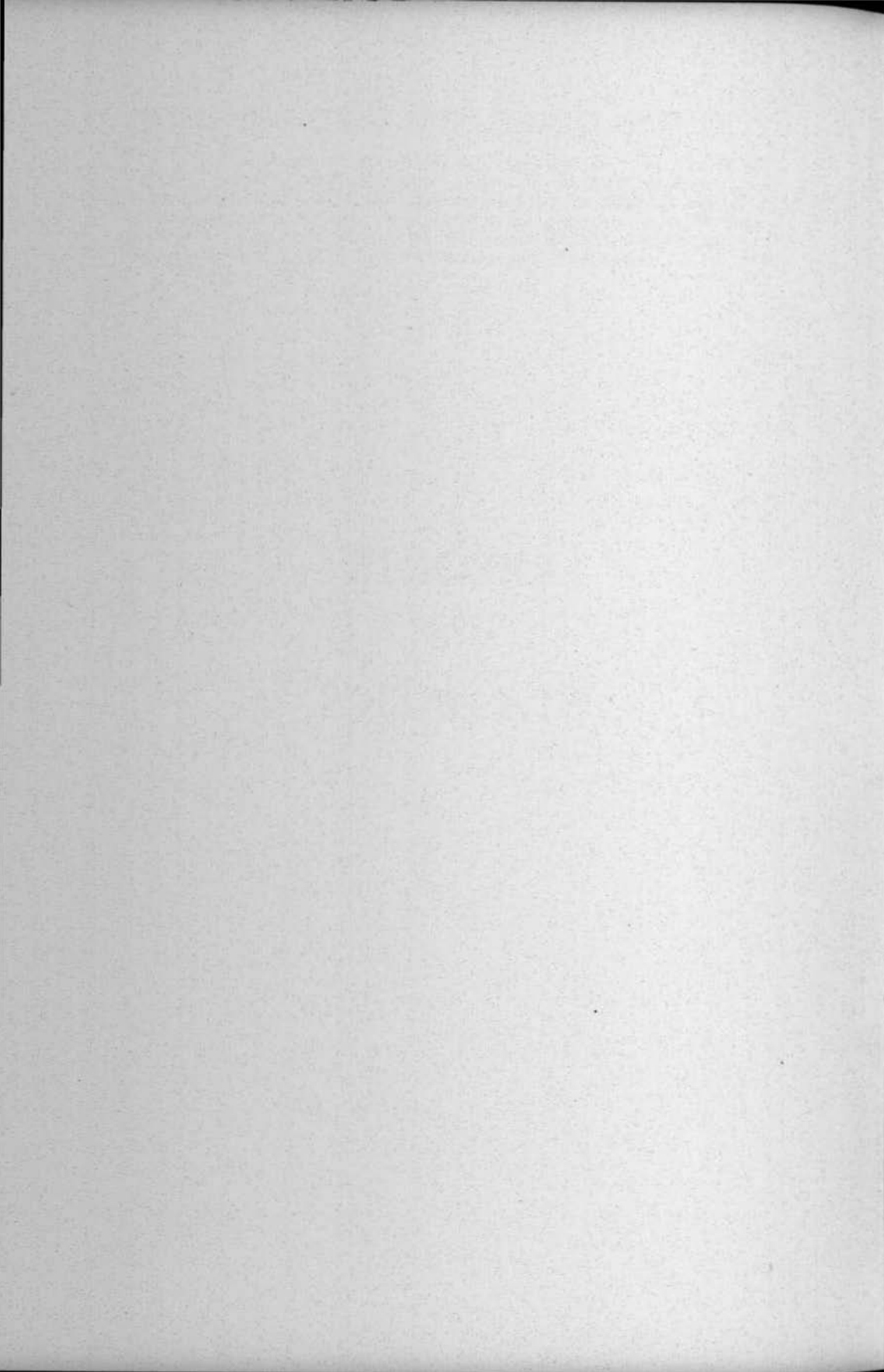
decisions thereunder.) No provisions of the 1968 Revised Constitution effect any change in or alter such tax day and tax year laws in any respect and not being inconsistent with the 1968 Constitution, such laws will remain in force after the new constitution becomes operative and until they are repealed or changed by the legislature. Thus, for 1969 the tax day will be Jan. 1, 1969 and the 1969 tax year will commence on that date. This is in accord with and provided for by §6(a), Art. XII, of the 1968 Revised Constitution. Accord, 16 C.J.S. (Constit. Law) §43; *Neisel v. Moran*, *supra*; *Bronson v. State* (Fla. 1956), 83 So.2d 849; Advisory Opinion (Fla. 1961), 132 So.2d 163; 16 Am. Jur. 2d (Constit. Law) §49.

Existing statutory and decisional law, which remains in full force and effect after the new constitution becomes operative as aforementioned, requires the status of real property, both as to taxation and as to exemption from taxation, irrespective of later change in status, to be determined as of January 1 of the tax year. *Simpson v. Hirshberg*, *supra*; *Jacksonville Expressway Authority v. Milford*, *supra*; AGO 057-227, 1957-1958 Biennial Report of the Attorney General, August 5, 1957. Insofar as the new tax exemption benefits are concerned, the rule of strict construction obtains for, as stated in *Overstreet v. Tubin* (Fla. 1951), 53 So.2d 913, exemptions from taxation, whether stated in the constitution or in statutes, are to be construed against the claimant and in favor of the taxing power. This, together with the foregoing laws and judicial principles, seems to preclude any retrospective operation of the new tax exemption benefits granted by §6, Art. VII, of the 1968 Revised Constitution.

Anticipating the submission of a revised constitution to the electors, the 1967 Legislature did enact Ch. 67-339, Laws of Florida, which purported to amend §§192.12 and 192.13, F. S., and which purports to grant and extend to the owners of separate condominium parcels and certain cooperative apartment units the right and benefit of the \$5,000 homestead tax exemption effective "on the first January 1st, after . . . a revised constitution of Florida is approved by a majority of the qualified electors. . . ." Under the Constitution of 1885, as amended, and so long as it remains in force and effect, the bestowal of such benefits was not within the grace or the power of the 1967 Legislature, and the statute cannot give birth to such endowments on Jan. 1, 1969, simply because on that date the legislature and the peoples of Florida will still be governed by the Constitution of 1885, as amended, and the laws validly subsisting thereunder. The statute cannot be validated by the subsequent approval or adoption of the revised constitution because the new constitution will not be in effect or operative on Jan. 1, 1969, and the new revision has no retroactive operation but rather operates prospectively, as discussed and noted hereinabove. Further, the new constitution itself gives the new benefits, not the legislature or its enactments, and the constitutional provisions are self-executing and do not require the aid of the legislature to activate their effect. The 1969 tax day is January 1 of that year and the 1969 tax year commences on that date. Sections 192.04 and 193.11, F. S., remain in force on and after Jan. 7, 1969 under the new constitution as above-mentioned. Neither the new constitution nor Ch. 67-339, Laws of Florida, alters or effects any change in the so-called tax day laws, in fact Ch. 67-339 does not even purport to amend such tax laws in any respect. The statute, however, is presumptively valid and is not wholly irreconcilable with the new constitution and to preserve its validity it need not be deemed inconsistent with the revised constitution insofar as it shall first become operative and applicable to the 1970 tax year commencing on Jan. 1, 1970.

In the light of the foregoing, it is my opinion that Ch. 67-339, Laws of Florida, does not become operative until the 1970 tax year commencing Jan. 1, 1970, and that the \$5,000 homestead tax exemption as extended to qualified owners of separate condominium and cooperative apartment unit owners by the 1968 Revised Constitution will not become legally operative until the tax year commencing Jan. 1, 1970.

REPORTS
AND
STATISTICS



CONSTITUTION OF THE STATE OF FLORIDA

AS REVISED IN 1968.

The Constitution of the State of Florida as it appears here represents a composite of amendments proposed by three joint resolutions which were adopted during the special session of June 24-July 3, 1968, and ratified by the people on November 5, 1968, together with one article carried forward from the Constitution of 1885, as amended. The articles proposed in House Joint Resolution 1-2X constitute the entire revised constitution with the exception of Articles V, VI, and VIII. Senate Joint Resolution 4-2X proposed a new Article VI, relating to suffrage and elections. Senate Joint Resolution 5-2X proposed a new Article VIII, relating to local government. Article V, relating to the judiciary, was carried forward from the Constitution of 1885, as amended. The indexes which appear at the beginning of each article and notes appearing at the end of various sections have been added for convenience and they, together with section and subsection headings, are not to be considered as part of the constitution. History notes to the sections of Article V have been carried forward with the sections. Sections having no history note were added as part of the 1968 revision.

PREAMBLE

We, the people of the State of Florida, being grateful to Almighty God for our constitutional liberty, in order to secure its benefits, perfect our government, insure domestic tranquillity, maintain public order, and guarantee equal civil and political rights to all, do ordain and establish this constitution.

ARTICLE I

DECLARATION OF RIGHTS

- Sec.
1. Political power.
 2. Basic rights.
 3. Religious freedom.
 4. Freedom of speech and press.
 5. Right to assemble.
 6. Right to work.
 7. Military power.
 8. Right to bear arms.
 9. Due process.
 10. Prohibited laws.
 11. Imprisonment for debt.
 12. Searches and seizures.

SECTION 1. Political power.—All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.

SECTION 2. Basic rights.—All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race or religion.

- Sec.
13. Habeas corpus.
 14. Bail.
 15. Prosecution for crime; offenses committed by children.
 16. Rights of accused.
 17. Excessive punishments.
 18. Administrative penalties.
 19. Costs.
 20. Treason.
 21. Access to courts.
 22. Trial by jury.

SECTION 3. Religious freedom.—There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

SECTION 4. Freedom of speech and press.—Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law

shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

SECTION 5. Right to assemble.—The people shall have the right peaceably to assemble, to instruct their representatives, and to petition for redress of grievances.

SECTION 6. Right to work.—The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

SECTION 7. Military power.—The military power shall be subordinate to the civil.

SECTION 8. Right to bear arms.—The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law.

SECTION 9. Due process.—No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

SECTION 10. Prohibited laws.—No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.

SECTION 11. Imprisonment for debt.—No person shall be imprisoned for debt, except in cases of fraud.

SECTION 12. Searches and seizures.—The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.

SECTION 13. Habeas corpus.—The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety.

SECTION 14. Bail.—Until adjudged guilty, every person charged with a crime or violation of municipal or county ordinance shall be en-

titled to release on reasonable bail with sufficient surety unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great.

SECTION 15. Prosecution for crime; offenses committed by children.—

(a) No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

(b) When authorized by law, a child as therein defined may be charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements applicable to criminal cases. Any child so charged shall, upon demand made as provided by law before a trial in a juvenile proceeding, be tried in an appropriate court as an adult. A child found delinquent shall be disciplined as provided by law.

SECTION 16. Rights of accused.—In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation against him, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties he will be tried. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

SECTION 17. Excessive punishments.—Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.

SECTION 18. Administrative penalties.—No administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law.

SECTION 19. Costs.—No person charged with crime shall be compelled to pay costs before a judgment of conviction has become final.

SECTION 20. Treason.—Treason against the state shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort, and no person shall be convicted of treason except on the testimony of two witnesses to the same overt act or on confession in open court.

SECTION 21. Access to courts.—The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, delay or delay.

SECTION 22. Trial by jury.—The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.

ARTICLE II

GENERAL PROVISIONS

Sec.

1. State boundaries.
2. Seat of government.
3. Branches of government.
4. State seal and flag.

SECTION 1. State boundaries.—

(a) The state boundaries are: Begin at the mouth of the Perdido River, which for the purposes of this description is defined as the point where latitude 30°16'53" north and longitude 87°31'06" west intersect; thence to the point where latitude 30°17'02" north and longitude 87°31'06" west intersect; thence to the point where latitude 30°18'00" north and longitude 87°27'08" west intersect; thence to the point where the center line of the Intracoastal Canal (as the same existed on June 12, 1953) and longitude 87°27'00" west intersect; the same being in the middle of the Perdido River; thence up the middle of the Perdido River to the point where it intersects the south boundary of the State of Alabama, being also the point of intersection of the middle of the Perdido River with latitude 31°00'00" north; thence east, along the south boundary line of the State of Alabama, the same being latitude 31°00'00" north to the middle of the Chattahoochee River; thence down the middle of said river to its confluence with the Flint River; thence in a straight line to the head of the St. Marys River; thence down the middle of said river to the Atlantic Ocean; thence due east to the edge of the Gulf Stream or a distance of three geographic miles whichever is the greater distance; thence in a southerly direction along the edge of the Gulf Stream or along a line three geographic miles from the Atlantic coastline and three leagues distant from the Gulf of Mexico coastline, whichever is greater, to and through the Straits of Florida and westerly, including the Florida reefs, to a point due south of and three leagues from the southernmost point of the Marquesas Keys; thence westerly along a straight line to a point due south of and three leagues from Loggerhead Key, the westernmost of the Dry Tortugas Islands; thence westerly, northerly and easterly along the arc of a curve three leagues distant from Loggerhead Key to a point due north of Loggerhead Key; thence northeast along a straight line to a point three leagues from the coastline of Florida; thence northerly and westerly three leagues distant from the coastline to a point west of the mouth of the Perdido River three leagues from the coastline as measured on a line bearing south 0°01'00" west from the point of beginning; thence northerly along said line to the point of beginning. The State of Florida shall also include any additional territory within the United States adjacent to the Peninsula of Florida lying south of the St.

Sec.

5. Public officers.
6. Enemy attack.
7. Natural resources and scenic beauty.

Marys River, east of the Perdido River, and south of the States of Alabama and Georgia.

(b) The coastal boundaries may be extended by statute to the limits permitted by the laws of the United States or international law.

SECTION 2. Seat of government.—The seat of government shall be the City of Tallahassee, in Leon County, where the offices of the governor, lieutenant governor, cabinet members and the supreme court shall be maintained and the sessions of the legislature shall be held; provided that, in time of invasion or grave emergency, the governor by proclamation may for the period of the emergency transfer the seat of government to another place.

SECTION 3. Branches of government.—The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

SECTION 4. State seal and flag.—The design of the great seal and flag of the state shall be prescribed by law.

SECTION 5. Public officers.—

(a) No person holding any office of emolument under any foreign government, or civil office of emolument under the United States or any other state, shall hold any office of honor or of emolument under the government of this state. No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein, except that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, constitutional convention, or statutory body having only advisory powers.

(b) Each state and county officer, before entering upon the duties of the office, shall give bond as required by law, and shall swear or affirm:

"I do solemnly swear (or affirm) that I will support, protect, and defend the Constitution and Government of the United States and of the State of Florida; that I am duly qualified to hold office under the Constitution of the state; and that I will well and faithfully perform the duties of (title of office) on which I am now about to enter.

So help me God."

and thereafter shall devote personal attention

to the duties of the office, and continue in office until his successor qualifies.

(c) The powers, duties, compensation and method of payment of state and county officers shall be fixed by law.

SECTION 6. Enemy attack.—In periods of emergency resulting from enemy attack the legislature shall have power to provide for prompt and temporary succession to the powers and duties of all public offices the incumbents of which may become unavailable to execute the functions of their offices, and to adopt such

other measures as may be necessary and appropriate to insure the continuity of governmental operations during the emergency. In exercising these powers, the legislature may depart from other requirements of this constitution, but only to the extent necessary to meet the emergency.

SECTION 7. Natural resources and scenic beauty.—It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise.

ARTICLE III LEGISLATURE

Sec.

1. Composition.
2. Members; officers.
3. Sessions of the legislature.
4. Quorum and procedure.
5. Investigations; witnesses.
6. Laws.
7. Passage of bills.
8. Executive approval and veto.
9. Effective date of laws.

SECTION 1. Composition.—The legislative power of the state shall be vested in a legislature of the State of Florida, consisting of a senate composed of one senator elected from each senatorial district and a house of representatives composed of one member elected from each representative district.

SECTION 2. Members; officers.—Each house shall be the sole judge of the qualifications, elections, and returns of its members, and shall biennially choose its officers, including a permanent presiding officer selected from its membership, who shall be designated in the senate as President of the Senate, and in the house as Speaker of the House of Representatives. The senate shall designate a Secretary to serve at its pleasure, and the house of representatives shall designate a Clerk to serve at its pleasure. The legislature shall appoint an auditor to serve at its pleasure who shall audit public records and perform related duties as prescribed by law or concurrent resolution.

SECTION 3. Sessions of the legislature.—

(a) **ORGANIZATION SESSIONS.** On the fourteenth day following each general election the legislature shall convene for the exclusive purpose of organization and selection of officers.

(b) **REGULAR SESSIONS.** A regular session of the legislature shall convene on the first Tuesday after the first Monday in April of each odd-numbered year, and on the first Tuesday after the first Monday in April, or such other date as may be fixed by law, of each even-numbered year.

(c) **SPECIAL SESSIONS.**

(1) The governor, by proclamation stating the purpose, may convene the legislature in special session during which only such legislative business may be transacted as is within the purview of the proclamation, or of a communi-

Sec.

10. Special laws.
11. Prohibited special laws.
12. Appropriation bills.
13. Term of office.
14. Civil service system.
15. Terms and qualifications of legislators.
16. Legislative apportionment.
17. Impeachment.
18. Conflict of interest.

cation from the governor, or is introduced by consent of two-thirds of the membership of each house.

(2) A special session of the legislature may be convened as provided by law.

(d) **LENGTH OF SESSIONS.** A regular session of the legislature shall not exceed sixty consecutive days, and a special session shall not exceed twenty consecutive days, unless extended beyond such limit by a three-fifths vote of each house. During such an extension no new business may be taken up in either house without the consent of two-thirds of its membership.

(e) **ADJOURNMENT.** Neither house shall adjourn for more than seventy-two consecutive hours except pursuant to concurrent resolution.

(f) **ADJOURNMENT BY GOVERNOR.** If, during any regular or special session, the two houses cannot agree upon a time for adjournment, the governor may adjourn the session sine die or to any date within the period authorized for such session; provided that, at least twenty-four hours before adjourning the session, he shall, while neither house is in recess, give each house formal written notice of his intention to do so, and agreement reached within that period by both houses on a time for adjournment shall prevail.

SECTION 4. Quorum and procedure.—

(a) A majority of the membership of each house shall constitute a quorum, but a smaller number may adjourn from day to day and compel the presence of absent members in such manner and under such penalties as it may prescribe. Each house shall determine its rules of procedure.

(b) Sessions of each house shall be public; except sessions of the senate when considering appointment to or removal from public office may be closed.

(c) Each house shall keep and publish a journal of its proceedings; and upon the request of five members present, the vote of each member voting on any question shall be entered on the journal.

(d) Each house may punish a member for contempt or disorderly conduct and, by a two-thirds vote of its membership, may expel a member.

SECTION 5. Investigations; witnesses.—Each house, when in session, may compel attendance of witnesses and production of documents and other evidence upon any matter under investigation before it or any of its committees, and may punish by fine not exceeding one thousand dollars or imprisonment not exceeding ninety days, or both, any person not a member who has been guilty of disorderly or contemptuous conduct in its presence or has refused to obey its lawful summons or to answer lawful questions. Such powers, except the power to punish, may be conferred by law upon committees when the legislature is not in session. Punishment of contempt of an interim legislative committee shall be by judicial proceedings as prescribed by law.

SECTION 6. Laws.—Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title. No law shall be revised or amended by reference to its title only. Laws to revise or amend shall set out in full the revised or amended act, section, subsection or paragraph of a subsection. The enacting clause of every law shall read: "Be It Enacted by the Legislature of the State of Florida:".

SECTION 7. Passage of bills.—Any bill may originate in either house and after passage in one may be amended in the other. It shall be read in each house on three separate days, unless this rule is waived by two-thirds vote. On each reading, it shall be read by title only, unless one-third of the members present desire it read in full. On final passage, the vote of each member voting shall be entered on the journal. Passage of a bill shall require a majority vote in each house. Each bill and joint resolution passed in both houses shall be signed by the presiding officers of the respective houses and by the secretary of the senate and the clerk of the house of representatives during the session or as soon as practicable after its adjournment sine die.

SECTION 8. Executive approval and veto.—(a) Every bill passed by the legislature shall be presented to the governor for his approval and shall become a law if he approves and signs it, or fails to veto it within seven consecutive days after presentation. If during that period or on the seventh day the legislature adjourns sine die or takes a recess of more than thirty days, he shall have fifteen consecutive days from the date of presentation to act on the bill. In all cases except general appropriation bills, the veto shall extend to the entire bill. The governor may veto any specific appropriation in

a general appropriation bill, but may not veto any qualification or restriction without also vetoing the appropriation to which it relates.

(b) When a bill or any specific appropriation of a general appropriation bill has been vetoed by the governor, he shall transmit his signed objections thereto to the house in which the bill originated in session. If that house is not in session, he shall file them with the secretary of state, who shall lay them before that house at its next regular or special session, and they shall be entered on its journal.

(c) If each house shall, by a two-thirds vote, re-enact the bill or reinstate the vetoed specific appropriation of a general appropriation bill, the vote of each member voting shall be entered on the respective journals, and the bill shall become law or the specific appropriation reinstated, the veto notwithstanding.

SECTION 9. Effective date of laws.—Each law shall take effect on the sixtieth day after adjournment sine die of the session of the legislature in which enacted or as otherwise provided therein. If the law is passed over the veto of the governor it shall take effect on the sixtieth day after adjournment sine die of the session in which the veto is overridden, on a later date fixed in the law, or on a date fixed by resolution passed by both houses of the legislature.

SECTION 10. Special laws.—No special law shall be passed unless notice of intention to seek enactment thereof has been published in the manner provided by general law. Such notice shall not be necessary when the law, except the provision for referendum, is conditioned to become effective only upon approval by vote of the electors of the area affected.

SECTION 11. Prohibited special laws.—(a) There shall be no special law or general law of local application pertaining to:

- (1) election, jurisdiction or duties of officers, except officers of municipalities, chartered counties, special districts or local governmental agencies;
- (2) assessment or collection of taxes for state or county purposes, including extension of time therefor, relief of tax officers from due performance of their duties, and relief of their sureties from liability;
- (3) rules of evidence in any court;
- (4) punishment for crime;
- (5) petit juries, including compensation of jurors, except establishment of jury commissions;
- (6) change of civil or criminal venue;
- (7) conditions precedent to bringing any civil or criminal proceedings, or limitations of time therefor;
- (8) refund of money legally paid or remission of fines, penalties or forfeitures;
- (9) creation, enforcement, extension or impairment of liens based on private contracts, or fixing of interest rates on private contracts;
- (10) disposal of public property, including any interest therein, for private purposes;
- (11) vacation of roads;

(12) private incorporation or grant of privilege to a private corporation;

(13) effectuation of invalid deeds, wills or other instruments, or change in the law of descent;

(14) change of name of any person;

(15) divorce;

(16) legitimation or adoption of persons;

(17) relief of minors from legal disabilities;

(18) transfer of any property interest of persons under legal disabilities or of estates of decedents;

(19) hunting or fresh water fishing;

(20) regulation of occupations which are regulated by a state agency; or

(21) any subject when prohibited by general law passed by a three-fifths vote of the membership of each house. Such law may be amended or repealed by like vote.

(b) In the enactment of general laws on other subjects, political subdivisions or other governmental entities may be classified only on a basis reasonably related to the subject of the law.

SECTION 12. Appropriation bills.—Laws making appropriations for salaries of public officers and other current expenses of the state shall contain provisions on no other subject.

SECTION 13. Term of office.—No office shall be created the term of which shall exceed four years except as provided herein.

SECTION 14. Civil service system.—By law there shall be created a civil service system for state employees, except those expressly exempted, and there may be created civil service systems and boards for county, district or municipal employees and for such offices thereof as are not elected or appointed by the governor, and there may be authorized such boards as are necessary to prescribe the qualifications, method of selection and tenure of such employees and officers.

SECTION 15. Terms and qualifications of legislators.—

(a) **SENATORS.** Senators shall be elected for terms of four years, those from odd-numbered districts in the years the numbers of which are multiples of four and those from even-numbered districts in even-numbered years the numbers of which are not multiples of four; except, at the election next following a reapportionment, some senators shall be elected for terms of two years when necessary to maintain staggered terms.

(b) **REPRESENTATIVES.** Members of the house of representatives shall be elected for terms of two years in each even-numbered year.

(c) **QUALIFICATIONS.** Each legislator shall be at least twenty-one years of age, an elector and resident of the district from which elected and shall have resided in the state for a period of two years prior to election.

(d) **ASSUMING OFFICE; VACANCIES.** Members of the legislature shall take office upon election. Vacancies in legislative office shall be filled only by election as provided by law.

SECTION 16. Legislative apportionment.

(a) **SENATORIAL AND REPRESENTATIVE DISTRICTS.** The legislature at its regular session in the second year following each decennial census, by joint resolution, shall apportion the state in accordance with the constitution of the state and of the United States into not less than thirty nor more than forty consecutively numbered senatorial districts of either contiguous, overlapping or identical territory, and into not less than eighty nor more than one hundred twenty consecutively numbered representative districts of either contiguous, overlapping or identical territory. Should that session adjourn without adopting such joint resolution, the governor by proclamation shall reconvene the legislature within thirty days in special apportionment session which shall not exceed thirty consecutive days, during which no other business shall be transacted, and it shall be the mandatory duty of the legislature to adopt a joint resolution of apportionment.

(b) **FAILURE OF LEGISLATURE TO APPOINTMENT; JUDICIAL REAPPORTIONMENT.** In the event a special apportionment session of the legislature finally adjourns without adopting a joint resolution of apportionment, the attorney general shall, within five days, petition the supreme court of the state to make such apportionment. No later than the sixtieth day after the filing of such petition, the supreme court shall file with the secretary of state an order making such apportionment.

(c) **JUDICIAL REVIEW OF APPORTIONMENT.** Within fifteen days after the passage of the joint resolution of apportionment, the attorney general shall petition the supreme court of the state for a declaratory judgment determining the validity of the apportionment. The supreme court, in accordance with its rules, shall permit adversary interests to present their views and, within thirty days from the filing of the petition, shall enter its judgment.

(d) **EFFECT OF JUDGMENT IN APPORTIONMENT; EXTRAORDINARY APPORTIONMENT SESSION.** A judgment of the supreme court of the state determining the apportionment to be valid shall be binding upon all the citizens of the state. Should the supreme court determine that the apportionment made by the legislature is invalid, the governor by proclamation shall reconvene the legislature within five days thereafter in extraordinary apportionment session which shall not exceed fifteen days, during which the legislature shall adopt a joint resolution of apportionment conforming to the judgment of the supreme court.

(e) **EXTRAORDINARY APPORTIONMENT SESSION; REVIEW OF APPORTIONMENT.** Within fifteen days after the adjournment of an extraordinary apportionment session, the attorney general shall file a petition in the supreme court of the state setting forth the apportionment resolution adopted by the legislature, or if none has been adopted reporting that fact to the court. Consideration of the validity of a joint resolution of apportionment

shall be had as provided for in cases of such joint resolution adopted at a regular or special apportionment session.

(f) **JUDICIAL REAPPORTIONMENT.** Should an extraordinary apportionment session fail to adopt a resolution of apportionment or should the supreme court determine that the apportionment made is invalid, the court shall, not later than sixty days after receiving the petition of the attorney general, file with the secretary of state an order making such apportionment.

SECTION 17. Impeachment.—

(a) The governor, lieutenant governor, members of the cabinet, justices of the supreme court, judges of district courts of appeal and judges of circuit courts shall be liable to impeachment for misdemeanor in office. The house of representatives by two-thirds vote shall have the power to impeach an officer. The speaker of the house of representatives shall have power at any time to appoint a committee to investigate charges against any officer subject to impeachment.

(b) An officer impeached by the house of representatives shall be disqualified from performing any official duties until acquitted by the senate, and unless the governor is im-

peached he may by appointment fill the office until completion of the trial.

(c) All impeachments by the house of representatives shall be tried by the senate. The chief justice of the supreme court, or another justice designated by him, shall preside at the trial, except in a trial of the chief justice, in which case the governor shall preside. The senate shall determine the time for the trial of any impeachment and may sit for the trial whether the house of representatives be in session or not. The time fixed for trial shall not be more than six months after the impeachment. During an impeachment trial senators shall be upon their oath or affirmation. No officer shall be convicted without the concurrence of two-thirds of the members of the senate present. Judgment of conviction in cases of impeachment shall remove the offender from office and, in the discretion of the senate, may include disqualification to hold any office of honor, trust or profit. Conviction or acquittal shall not affect the civil or criminal responsibility of the officer.

SECTION 18. Conflict of interest.—A code of ethics for all state employees and non-judicial officers prohibiting conflict between public duty and private interests shall be prescribed by law.

ARTICLE IV

EXECUTIVE

Sec.

1. Governor.
2. Lieutenant governor.
3. Succession to office of governor; acting governor.
4. Cabinet.
5. Election of governor, lieutenant governor and cabinet members; qualifications; terms.

SECTION 1. Governor.—

(a) The supreme executive power shall be vested in a governor. He shall be commander-in-chief of all military forces of the state not in active service of the United States. He shall take care that the laws be faithfully executed, commission all officers of the state and counties, and transact all necessary business with the officers of government. He may require information in writing from all executive or administrative state, county or municipal officers upon any subject relating to the duties of their respective offices.

(b) The governor may initiate judicial proceedings in the name of the state against any executive or administrative state, county or municipal officer to enforce compliance with any duty or restrain any unauthorized act.

(c) The governor may request in writing the opinion of the justices of the supreme court as to the interpretation of any portion of this constitution upon any question affecting his executive powers and duties. The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their written opinion

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6. Executive departments.
7. Suspensions; filling office during suspensions.
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not earlier than ten days from the filing and docketing of the request, unless in their judgment the delay would cause public injury.

(d) The governor shall have power to call out the militia to preserve the public peace, execute the laws of the state, suppress insurrection, or repel invasion.

(e) The governor shall by message at least once in each regular session inform the legislature concerning the condition of the state, propose such reorganization of the executive department as will promote efficiency and economy, and recommend measures in the public interest.

(f) When not otherwise provided for in this constitution, the governor shall fill by appointment any vacancy in state or county office for the remainder of the term of an appointive office, and for the remainder of the term of an elective office if less than twenty-eight months, otherwise until the first Tuesday after the first Monday following the next general election.

SECTION 2. Lieutenant governor.—There shall be a lieutenant governor. He shall perform such duties pertaining to the office of governor

as shall be assigned to him by the governor, except when otherwise provided by law, and such other duties as may be prescribed by law.

SECTION 3. Succession to office of governor; acting governor.—

(a) Upon vacancy in the office of governor, the lieutenant governor shall become governor. Further succession to the office of governor shall be prescribed by law. A successor shall serve for the remainder of the term.

(b) Upon impeachment of the governor and until completion of trial thereof, or during his physical or mental incapacity, the lieutenant governor shall act as governor. Further succession as acting governor shall be prescribed by law. Incapacity to serve as governor may be determined by the supreme court upon due notice after docketing of a written suggestion thereof by four cabinet members, and in such case restoration of capacity shall be similarly determined after docketing of written suggestion thereof by the governor, the legislature or four cabinet members. Incapacity to serve as governor may also be established by certificate filed with the secretary of state by the governor declaring his incapacity for physical reasons to serve as governor, and in such case restoration of capacity shall be similarly established.

SECTION 4. Cabinet.—

(a) There shall be a cabinet composed of a secretary of state, an attorney general, a comptroller, a treasurer, a commissioner of agriculture and a commissioner of education. In addition to the powers and duties specified herein, they shall exercise such powers and perform such duties as may be prescribed by law.

(b) The secretary of state shall keep the records of the official acts of the legislative and executive departments.

(c) The attorney general shall be the chief state legal officer.

(d) The comptroller shall serve as the chief fiscal officer of the state, and shall settle and approve accounts against the state.

(e) The treasurer shall keep all state funds and securities. He shall disburse state funds only upon the order of the comptroller, countersigned by the governor. The governor shall countersign as a ministerial duty subject to original mandamus.

(f) The commissioner of agriculture shall have supervision of matters pertaining to agriculture except as otherwise provided by law.

(g) The commissioner of education shall supervise the public education system in the manner prescribed by law.

SECTION 5. Election of governor, lieutenant governor and cabinet members; qualifications; terms.—

(a) At a state-wide general election in each calendar year the number of which is even but not a multiple of four, the electors shall choose a governor and a lieutenant governor and members of the cabinet each for a term of four years beginning on the first Tuesday after the

first Monday in January of the succeeding year. In the general election and in party primaries, if held, all candidates for the offices of governor and lieutenant governor shall form joint candidacies in a manner prescribed by law so that each voter shall cast a single vote for a candidate for governor and a candidate for lieutenant governor running together.

(b) When elected, the governor, lieutenant governor and each cabinet member must be an elector not less than thirty years of age who has resided in the state for the preceding seven years. The attorney general must have been a member of the bar of Florida for the preceding five years. No person who has, or but for resignation would have, served as governor or acting governor for more than six years in two consecutive terms shall be elected governor for the succeeding term.

SECTION 6. Executive departments.—All functions of the executive branch of state government shall be allotted among not more than twenty-five departments, exclusive of those specifically provided for or authorized in this constitution. The administration of each department, unless otherwise provided in this constitution, shall be placed by law under the direct supervision of the governor, the lieutenant governor, the governor and cabinet, a cabinet member, or an officer or board appointed by and serving at the pleasure of the governor, except:

(a) When provided by law, confirmation by the senate or the approval of three members of the cabinet shall be required for appointment to or removal from any designated statutory office.

(b) Boards authorized to grant and revoke licenses to engage in regulated occupations shall be assigned to appropriate departments and their members appointed for fixed terms, subject to removal only for cause.

SECTION 7. Suspensions; filling office during suspensions.—

(a) By executive order stating the grounds and filed with the secretary of state, the governor may suspend from office any state officer not subject to impeachment, any officer of the militia not in the active service of the United States, or any county officer, for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform his official duties, or commission of a felony, and may fill the office by appointment for the period of suspension. The suspended officer may at any time before removal be reinstated by the governor.

(b) The senate may, in proceedings prescribed by law, remove from office or reinstate the suspended official and for such purpose the senate may be convened in special session by its president or by a majority of its membership.

(c) By order of the governor any elected municipal officer indicted for crime may be suspended from office until acquitted and the office filled by appointment for the period of suspension, not to extend beyond the term, unless these powers are vested elsewhere by law or the municipal charter.

SECTION 8. Clemency.—

(a) Except in cases of treason and in cases where impeachment results in conviction, the governor may, by executive order filed with the secretary of state, suspend collection of fines and forfeitures, grant reprieves not exceeding sixty days and, with the approval of three members of the cabinet, grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses.

(b) In cases of treason the governor may grant reprieves until adjournment of the regular session of the legislature convening next after the conviction, at which session the legislature may grant a pardon or further reprieve; otherwise the sentence shall be executed.

(c) There may be created by law a parole and probation commission with power to super-

vise persons on probation and to grant paroles or conditional releases to persons under sentences for crime. The qualifications, method of selection and terms, not to exceed six years, of members of the commission shall be prescribed by law.

SECTION 9. Game and fresh water fish commission.—There shall be a game and fresh water fish commission, composed of five members appointed by the governor for staggered terms of five years. The commission shall exercise the non-judicial powers of the state with respect to wild animal life and fresh water aquatic life, except that all license fees for taking wild animal life and fresh water aquatic life and penalties for violating regulations of the commission shall be prescribed by specific statute.

ARTICLE V**JUDICIAL DEPARTMENT**

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3. Practice and procedure.
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5. District courts of appeal.
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7. County judges' courts.
8. County courts; organization and officers.
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- 9A. Additional judge, Duval county criminal court of record.
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- 9C. Hillsborough county, offices of the state attorney and county solicitor.
10. Court of record of Escambia county.
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- 11A. Orange county; boundaries of justice of peace districts.
12. Juvenile courts; establishment; jurisdiction; judge; officers; procedure.

SECTION 1. Courts.—The judicial power of the State of Florida is vested in a supreme court, district courts of appeal, circuit courts, Court of Record of Escambia County, criminal courts of record, county courts, county judge's courts, juvenile courts, courts of justices of the peace, and such other courts, including municipal courts, or commissions, as the legislature may from time to time ordain and establish.

History.—Am. H.J.R. 810, 1955; adopted 1956.

SECTION 2. Administration.—The chief justice of the supreme court is vested with, and shall exercise in accordance with rules of that court, authority temporarily to assign justices of the supreme court to district courts of appeal and circuit courts, judges of district courts of appeal and circuit judges to the supreme court, district courts of appeal, and circuit courts, and judges of other courts, ex-

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cept municipal courts, to judicial service in any court of the same or lesser jurisdiction. Any retired justice or judge may, with his consent, be likewise assigned to judicial service.

History.—Am. H.J.R. 810, 1955; adopted, 1956.

SECTION 3. Practice and procedure.—The practice and procedure in all courts shall be governed by rules adopted by the supreme court.

History.—Am. H.J.R. 810, 1955; adopted, 1956.

SECTION 4. Supreme Court.—

(1) **ORGANIZATION.** The supreme court shall consist of seven members, one of whom shall be the chief justice. Five justices shall constitute a quorum, but the concurrence of four shall be necessary to a decision.

(2) **JURISDICTION.** Appeals from trial courts may be taken directly to the supreme

court, as a matter of right, only from judgments imposing the death penalty, from final judgments or decrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness. The supreme court may directly review by certiorari interlocutory orders or decrees passing upon chancery matters which upon a final decree would be directly appealable to the supreme court. In all direct appeals and interlocutory reviews by certiorari, the supreme court shall have such jurisdiction as may be necessary to complete determination of the cause on review.

Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law.

The supreme court may issue writs of mandamus and quo warranto when a state officer, board, commission, or other agency authorized to represent the public generally, or a member of any such board, commission, or other agency, is named as respondent, and writs of prohibition to commissions established by law, to the district courts of appeal, and to the trial courts when questions are involved upon which a direct appeal to the supreme court is allowed as a matter of right.

The supreme court may issue all writs necessary or proper to the complete exercise of its jurisdiction.

The supreme court or any justice thereof may issue writs of habeas corpus returnable before the supreme court or any justice thereof, or before a district court of appeal or any judge thereof, or before any circuit judge.

The supreme court shall provide for the transfer to the court having jurisdiction of any matter subject to review when the jurisdiction of another appellate court has been improvidently invoked.

(3) **CHIEF JUSTICE.** The chief justice of the supreme court shall be chosen by the members of the court and shall serve for a term of two years. In the event of a vacancy, a successor shall be chosen within sixty days for a like term. During a vacancy or whenever the chief justice is unable to act for any reason, the justice longest in continuous service and able to act shall act as chief justice.

(4) **CLERK AND MARSHAL; PROCESS.** The supreme court shall appoint a clerk and

a marshal who shall hold office during the pleasure of the court and perform such duties as the court directs. Their compensation shall be fixed by law. The marshal shall have the power to execute the process of the court throughout the state, and in any county may deputize the sheriff or a deputy sheriff for such purpose.

History.—Am. H.J.R. 810, 1955; adopted, 1956.

SECTION 5. District Courts of Appeal.—

(1) **APPELLATE DISTRICTS.** The state shall be divided into four or more appellate districts of contiguous counties as the Legislature may from time to time prescribe, and there shall be organized a district court of appeal in each district.

(2) **ORGANIZATION; NUMBER AND SELECTION OF JUDGES.** There shall initially be three judges in each district court of appeal, and the Legislature may provide for additional judges for any district court of appeal and may reduce the number of any district to not less than three. Three judges shall constitute a panel for and shall consider each case, and the concurrence of a majority of the panel shall be necessary to a decision. The court shall hold at least one session every year in each judicial circuit within the district wherein there is ready business to transact. After a change in the territorial limits of any appellate district, all proceedings then pending within the jurisdiction of each district court of appeal shall be transferred to the court then having jurisdiction, except causes which have been orally argued.

(3) **JURISDICTION.** Appeals from trial courts in each appellate district, and from final orders or decrees of county judge's courts pertaining to probate matters or to estates and interests of minors and incompetents, may be taken to the court of appeal of such district, as a matter of right, from all final judgments or decrees except those from which appeals may be taken direct to the supreme court or to a circuit court.

The supreme court shall provide for expeditious and inexpensive procedure in appeals to the district courts of appeal, and may provide for review by such courts of interlocutory orders or decrees in matters reviewable by the district courts of appeal.

The district courts of appeal shall have such powers of direct review of administrative action as may be provided by law.

A district court of appeal or any judge thereof may issue writs of habeas corpus returnable before that district court of appeal or any judge thereof, or before any circuit judge in that district. A district court of appeal may issue writs of mandamus, certiorari, prohibition, and quo warranto, and also all writs necessary or proper to the complete exercise of its jurisdiction.

(4) **CLERKS AND MARSHALS.** Each district court of appeal shall appoint a clerk and a marshal who shall hold office during the pleasure of the court and perform such duties as the court may direct. Their compensation

shall be fixed by law. The marshal shall have power to execute the process of the court throughout the state, and in any county may deputize the sheriff or a deputy sheriff for such purpose.

History.—Am. H.J.R. 810, 1955; adopted, 1956; (1) (2) Am. H.J.R. 1601, 1959; adopted 1960; (1) (2) Am. S.J.R. 261, 1965; adopted 1965.

SECTION 6. Circuit Courts.—

(1) **JUDICIAL CIRCUITS.** The legislature may establish not more than twenty judicial circuits, each composed of a county or contiguous counties and of not less than fifty thousand inhabitants, according to the last census authorized by law, except that the county of Monroe shall constitute one of the circuits; provided, however, there shall be no reduction in the number of circuit judges residing in any county formerly a part of a judicial circuit, which circuit is hereafter created, divided, changed or revised.

(2) **CIRCUIT JUDGES.** The legislature shall provide for one circuit judge in each circuit for each fifty thousand inhabitants or major fraction thereof according to the last census authorized by law. In circuits having more than one judge the legislature may designate the place of residence of any such additional judge or judges.

(3) **JURISDICTION.** The circuit courts shall have exclusive original jurisdiction in all cases in equity except such equity jurisdiction as may be conferred on juvenile courts, in all cases at law not cognizable by subordinate courts, in all cases involving the legality of any tax, assessment, or toll, in the action of ejectment, in all actions involving the titles or boundaries of real estate, and in all criminal cases not cognizable by subordinate courts. They shall have original jurisdiction of actions of forcible entry and unlawful detainer, and of such other matters as the legislature may provide. They shall have final appellate jurisdiction in all civil and criminal cases arising in the county court, or before county judges' courts, of all misdemeanors tried in criminal courts of record, and of all cases arising in municipal courts, small claims courts, and courts of justices of the peace. The circuit courts and judges shall have power to issue writs of mandamus, injunction, quo warranto, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction.

The circuit courts and circuit judges shall have such extra-territorial jurisdiction in chancery cases as may be prescribed by law.

(4) **COURT COMMISSIONERS.** A circuit judge may appoint in each county in his circuit one or more attorneys at law, to be court commissioners, who shall have power in the absence from the county of the circuit judge, to allow writs of injunction and to issue writs of habeas corpus, returnable before himself or the circuit judge. Their orders in such matters may be reviewed by the circuit judge, and confirmed, qualified or vacated. They may be remov-

ed by the circuit judge. The legislature may confer upon them further powers, not judicial, and shall fix their compensation.

(5) **RECOMMENDATION TO ATTORNEY GENERAL; REPORT TO LEGISLATURE.** It shall be the duty of the judges of the circuit courts to report to the attorney general at least thirty days before each session of the legislature such defects in the laws as may have been brought to their attention, and to suggest such amendments or additional legislation as may be deemed necessary. The attorney general shall report to the legislature at each session such legislation as he may deem advisable.

(6) **STATE ATTORNEYS.** In each judicial circuit a state attorney shall be elected by the qualified electors of that circuit in the same manner as other state and county officials, to serve a term of four years and to fulfill duties prescribed by law.

(7) **CLERKS OF THE CIRCUIT COURTS.** In each county a clerk of the circuit court, who shall also be clerk of the board of county commissioners, recorder, and ex officio auditor of the county, shall be elected by the qualified electors of that county in the same manner as other state and county officials, to serve a term of four years and to fulfill duties prescribed by law.

History.—Am. H.J.R. 810, 1955; adopted, 1956; (1) Am. H.J.R. 59, 1963; adopted, 1964.

SECTION 7. County Judges' Courts.—

(1) **ESTABLISHMENT.** There shall be a county judge's court in each county.

(2) **COUNTY JUDGES.** There shall be in each county a county judge or county judges in such number as the legislature shall provide who shall be elected by the qualified electors of the county at the time and places of voting for other county officers and shall hold office for four years. Compensation shall be as provided by law.

(3) **JURISDICTION.** The county judges' courts shall have original jurisdiction in all cases at law in which the demand or value of property involved shall be as provided by the legislature; of proceedings relating to the forcible or unlawful detention of lands and tenements; and of such criminal cases as the legislature may prescribe. The county judges' courts shall have jurisdiction of the settlement of the estate of decedents and minors, to order the sale of real estate of decedents and minors, to take probate of wills, to grant letters testamentary and of administration and guardianship, and to discharge the duties usually pertaining to courts of probate. The county judge shall have the power of committing magistrates.

(4) **PRESCRIBED QUALIFICATION AUTHORIZED.** The legislature may require by special act, subject to approval by referendum within the county, that the county judge of any county be a member of The Florida Bar; provided such law shall not affect the term of office or the reelection of any county judge

holding office on the date of its enactment who is not a member of The Florida Bar.

History.—Am. H.J.R. 810, 1955; adopted, 1956; (2A) added H.J.R. 1649, 1965; adopted, 1965; Am. S.J.R. 662, 1965; adopted, 1966; (4) added H.J.R. 176, 1965; adopted, 1966.

SECTION 8. County Courts; organization and officers.—The legislature may organize in such counties, as it may think proper, county courts which shall have jurisdiction of all cases at law in which the demand or value of the property involved shall not exceed five hundred dollars; of proceedings relating to the forcible entry or unlawful detention of lands and tenements, and of misdemeanors. The county judge shall be the judge of said court. There shall be elected by the qualified electors of said county at the time when the said judge is elected a prosecuting attorney for said county, who shall hold office for four years. His duties and compensation shall be prescribed by law. Such courts may be abolished at the pleasure of the legislature.

History.—Am. H.J.R. 810, 1955; adopted, 1956.

SECTION 9. Criminal Courts of Record.—

(1) **ORGANIZATION AND JUDGES.** The legislature may provide for the establishment of a criminal court of record in any county. Judges of criminal courts of record shall be elected for a term of four years by the qualified electors of the county, in the same manner as other state and county officials. Their compensation shall be fixed by law and paid by the county.

In any county having a population in excess of 125,000 and not more than 250,000 according to the last decennial federal census, or census authorized by the legislature and paid for by the county, the legislature may provide for an additional judge of the criminal court of record for such county, provided that any law having for its purpose the creating of an additional judge of said court in such county shall not become effective unless ratified by a majority of the participating voters of such county in an election presenting the same for approval or rejection. In any county having a population of more than 250,000 according to such census, the legislature may, without referendum thereon, provide for one additional county judge for each additional 250,000 of population or major fraction thereof.

(2) **JURISDICTION.** The said courts shall have jurisdiction of all criminal cases not capital which shall arise in said counties respectively.

(3) **TERMS.** There shall be six terms of said courts in each year.

(4) **PROSECUTING ATTORNEY; TERM.** There shall be for each of said courts a prosecuting attorney who shall be elected for a term of four years by the qualified electors of the county as other state and county officials are elected and whose compensation shall be fixed by law.

(5) **INDICTMENT AND INFORMATION.** All offenses triable in said court shall be prosecuted upon information under oath, to be filed

by the prosecuting attorney, but the grand jury of the circuit court for the county in which said criminal court is held may indict for offenses triable in the criminal court. Upon the finding of such indictment the circuit judge shall commit or bail the accused for trial in the criminal court, which trial shall be upon information.

(6) **CRIMINAL COURTS OF RECORD SUPERSEDE CRIMINAL JURISDICTION OF COUNTY COURTS.** The county courts in counties where such criminal courts are established shall have no criminal jurisdiction and no prosecuting attorney.

(7) **CLERK.** The clerk of said court shall be elected by the electors of the county in which the court is held and shall hold office for four years, and his compensation shall be fixed by law. He shall also be clerk of the county court. The sheriff of the county shall be the executive officer of said court, and his duties and fees shall be fixed by law.

(8) **STATE ATTORNEY ELIGIBLE FOR APPOINTMENT AS COUNTY SOLICITOR.** The state attorney residing in the county where such court is held shall be eligible for appointment as county solicitor for said county.

(9) **CRIMINAL COURTS OF RECORD MAY BE ABOLISHED BY LEGISLATURE.** Such courts may be abolished by the legislature.

(10) The clerk of the circuit court in and for Palm Beach county shall also be and serve as the clerk of the Palm Beach county criminal court of record.

History.—Am. H. J. R. 810, 1955; adopted 1956; (10) added H. J. R. 596, 1965; adopted, 1965.

SECTION 9A. Additional judge, Duval County criminal court of record.—From and after the adoption of this Amendment, there shall be a Judge of the Criminal Court of Record of Duval County, Florida, in addition to the Judge of said Criminal Court of Record already provided in said county, said Judge shall be elected at the General Election next succeeding the coming into effect of this Amendment, except as otherwise provided herein, and shall hold office for four years and receive the same salary and allowances for expenses as is provided by law for the Judge of a Criminal Court of Record of Duval County. He shall have all powers and perform all duties and possess all qualifications that are or may be provided or prescribed by the Constitution or by statute for the Judge of the Criminal Court of Record of Duval County, and all statutes concerning said Judge shall apply to him. Provided, however, that if there be a judge of a Provisional Criminal Court in Duval County upon the adoption of this Amendment, such Judge shall become such additional Judge, and shall be commissioned by the Governor to hold office as a Judge of the Criminal Court of Record of Duval County, until his successor is duly elected and qualified.

On and after the first Tuesday after the first Monday in January, 1965, the State Attorney of the Fourth Judicial Circuit shall be the prosecuting attorney of the Criminal Court of Rec-

ord of Duval County, Florida, and the office of County Solicitor, the position of Assistant County Solicitor, the position of Special Investigator for the County Solicitor in Duval County, shall stand abolished and terminated; and thereafter the State Attorney and his Assistant Attorneys, under his direction, shall perform all the duties and functions of office heretofore performed by the County Solicitor. Pending informations filed in the Criminal Court of Record shall not be invalidated hereby, and the State Attorney, or his Assistant State Attorneys, may file amended informations in any such cases if and when necessary. The Legislature may provide for Assistant State Attorneys and Special Investigators for the State Attorney of the Fourth Judicial Circuit, and all Assistant State Attorneys of said Fourth Judicial Circuit shall be appointed by the State Attorney and sworn in by the Court, and such Assistant State Attorneys shall work under the direction of the State Attorney and shall have full authority to do and perform any official duties and acts that the State Attorney may do and perform within said Fourth Judicial Circuit.

Upon this amendment being adopted all funds appropriated by law approved by the Budget Commission and budgeted by the Board of County Commissioners of Duval County, Florida, and for the purpose of employing Assistant County Solicitors and other office personnel shall thereafter be used for the operation of the State Attorneys office of the Fourth Judicial Circuit, and for the employing of Assistant State Attorneys and other personnel, of that office, and the State Attorney is hereby authorized to employ such personnel, including Assistant State Attorneys and investigators in the same number and to be paid the same salary as the number of Assistant County Solicitors and investigators employed by the County Solicitor of Duval County, Florida.

History.—Added S.J.R. 777, 1955; adopted 1956; Am. S.J.R. 218, 1961; adopted 1962.

SECTION 9B. Dade County, state attorney as prosecuting attorney, criminal court of record.—On and after the first Tuesday after the first Monday in January, 1957, the State Attorney of the Eleventh Judicial Circuit in and for Dade County, Florida, shall be the prosecuting attorney of the Criminal Court of Record and the Court of Crimes of Dade County, and the office of County Solicitor, the position of Assistant County Solicitor, the positions of process server and investigator in Dade County, shall stand abolished and terminated; and thereafter the State Attorney and his Assistant State Attorneys, under his direction, shall perform all of the duties and functions of office heretofore performed by the County Solicitor. Pending informations filed in the Criminal Court of Record or Court of Crimes shall not be invalidated hereby, and the State Attorney, or his Assistant State Attorneys, may file amended informations in any such cases if and when necessary. The Legislature may provide for Assistant State Attorneys and special investigators for the State Attorney of

Dade County, and all Assistant State Attorneys shall be appointed by the State Attorney and sworn in by the Court, and such Assistant State Attorneys shall work under the direction of the State Attorney and shall have full authority to do and perform any official act that the State Attorney may do and perform.

Upon this amendment being adopted all funds appropriated by law approved by the Budget Commission and budgeted by the Board of County Commissioners of Dade County for the use of office of County Solicitor of Dade County, Florida, and for the purpose of employing Assistant County Solicitors and other office personnel shall thereafter be used for the operation of the State Attorney's Office of the Eleventh Judicial Circuit in and for Dade County, and the employing of Assistant State Attorneys and other personnel for the operation of that office, and the said State Attorney is hereby authorized to employ such personnel, including Assistant State Attorneys, process servers and investigator, in the same number and to be paid the same salary as the number of Assistant County Solicitors, process servers and investigator employed by the County Solicitor of Dade County, Florida.

History.—Added S.J.R. 1201, 1955; adopted 1956.

SECTION 9C. Hillsborough County, offices of the state attorney and county solicitor.—On and after the first Tuesday after the first Monday in January, 1969, there shall be a Prosecuting Attorney of the Criminal Court of Record of Hillsborough County to be known as County Solicitor who shall be a separate official elected for a term of four years by the qualified electors of the county as other state and county officials are elected and whose compensation shall be fixed by law. Said County Solicitor shall perform the functions and duties of a County Solicitor in the Criminal Court of Record of Hillsborough County, Florida, as prescribed by law in all noncapital felony cases and other lesser offenses in said court's jurisdiction.

After said time there shall also be a State Attorney of the Thirteenth Judicial Circuit in and for Hillsborough County who shall be a separate official elected by the qualified electors of that circuit in the same manner as other state and county officials to serve a term of four years who shall fulfill the duties prescribed by law, including, but not limited to, prosecution of all capital felony cases.

The legislature may provide for Assistant State Attorneys and Special Investigators for the State Attorney and for Assistant County Solicitors and Special Investigators for the County Solicitor of Hillsborough County, Florida, and all Assistant State Attorneys and Assistant County Solicitors and Investigators shall be appointed by the State Attorney and the County Solicitor respectively and sworn in by the court, and such Assistant State Attorneys and County Solicitors shall work under the direction of said State Attorney and County Solicitor and shall have full authority to do and perform any of the official duties and acts

that the State Attorney and County Solicitor may do and perform.

Pending informations filed in the Criminal Court of Record of Hillsborough County shall not be invalidated by this amendment or affected in any way hereby; and the County Solicitor may file amended informations in any such cases if and when necessary.

The County Commissioners shall, upon this amendment becoming effective, apportion the funds appropriated for the operation of the State Attorney's Office between the State Attorney's Office and the County Solicitor's Office on the basis of the case load, personnel assigned in the State Attorney's Office to handle the duties of the newly created County Solicitor, and the cost of operations of said two offices. Thereafter, the Board of County Commissioners of Hillsborough County shall appropriate such funds as to them may be reasonably required for the operation of the State Attorney's Office and County Solicitor's Office.

It is the express intent of the legislature and the electors of the State of Florida to create offices of the State Attorney and County Solicitor in Hillsborough County, Florida, which shall be separate, distinct, and unconnected with each other so that the same shall be and exist as they did in said county before the first Tuesday after the first Monday in January of 1961.

History.—Added S.J.R. 532, 1957; adopted 1958; Am. S.J.R. 6, 1965; adopted 1966.

SECTION 10. Court of Record of Escambia County.—In Escambia County there shall be a court of record with two or more judges as the legislature may provide, who shall be elected for a term of six years by the qualified electors of said county as other county officials are elected, and whose compensation shall be fixed by the legislature. Said court shall have exclusive jurisdiction of all criminal cases not capital and, concurrent with the circuit court of said county and the judges thereof, the same original jurisdiction of all cases and matters and the same power and authority to issue all writs as the circuit court of said county and the judges thereof, excepting the power to summon and empanel a grand jury, and jurisdiction of such other matters as the legislature may provide. The rules of procedure and practice applicable to the circuit court of said county shall obtain in the court of record.

The provisions of this constitution and all laws enacted in consonance therewith pertaining to circuit courts and the officers thereof and to appeals and writs of error from circuit courts, including the manner of the appointment or election and the terms of office and compensation of said officers, shall apply with like effect to the court of record of Escambia County and the officers thereof except as otherwise provided in this section; provided that the compensation and expense allowances of said judges of said court of record shall be paid by Escambia County and shall be the same as paid to and received from all sources by judges of the circuit court of said county resident in said county.

At the request of a judge of the circuit court of Escambia County evidenced as now provided by law a judge of the court of record may assume and perform in every respect the jurisdiction and duties of the circuit court of Escambia County or a judge thereof, including the trial of capital cases and the power to summon and empanel a grand jury; and at the request of a judge of the court of record evidenced as now provided by law a judge of the circuit court of Escambia County may assume and perform in every respect the duties and jurisdiction of the court of record of Escambia County or a judge thereof.

There shall hereafter be elected for a term of four years by the qualified electors of Escambia County, Florida, a prosecuting attorney, who shall be known as "County Solicitor of Escambia County, Florida", and who shall be the prosecuting attorney in the Court of Record in and for Escambia County, Florida, and his duties and compensation shall be fixed by law. An election for County Solicitor shall be held at the general election in 1958, and each four years thereafter, and the person elected at any such election shall take office the first Tuesday after the first Monday in January succeeding the date of the election. Any person now occupying such office or who shall hereafter be appointed to fill any vacancy therein shall continue in office until the election and qualification of a County Solicitor hereunder.

All offenses triable in the Court of Record in and for Escambia County, Florida, shall be prosecuted upon information under oath, to be filed by the County Solicitor, but the Grand Jury of the Circuit Court for Escambia County, Florida, may indict for offenses triable in said Court. Upon the finding of any such indictment the Circuit Judge shall admit to bail or commit the accused pending trial in the Court of Record in and for Escambia County, Florida, and trial shall be upon information filed by the County Solicitor.

The Clerk of said Court shall be elected by the electors of Escambia County at the General Election in 1960 and each four years thereafter, and the person elected shall hold office for four years. The compensation and duties of the Clerk shall be fixed by law. The Clerk of the Court of Record in and for Escambia County, Florida, elected at the General Election of 1956 and any successor appointed to fill any vacancy in said office which may occur, shall hold office until the first Tuesday after the first Monday, January, 1961.

The sheriff of the County shall be the executive officer of said Court and his duties and compensation shall be fixed by law.

In event of vacancy in the office of County Solicitor, Clerk or other officer of the Court of Record in and for Escambia County, Florida, from any cause, the successor to fill such vacancy shall be appointed by the Governor to serve for the unexpired term of such office which has become vacant.

History.—Am. H. J. R. 83-XX, 1956, adopted 1956.

SECTION 11. Courts of Justices of the Peace.—

(1) **DISTRICTS AND PRESIDING OFFICER.** There shall be not more than five justice districts in each county, and there shall be elected one justice of the peace for each justice district, who shall hold office for four years. Existing justice districts are hereby recognized, but the legislature may, by special act, from time to time change the boundaries of any such district now or hereafter established, and may establish new or abolish any such district now or hereafter existing. Provided, however, that any such changes shall be submitted to the people of any county so affected, by referendum at the next ensuing general election.

(2) **JURISDICTION.** The justices of the peace shall have jurisdiction in cases at law in which the demand or value of the property involved does not exceed \$100.00, and in which the cause of action accrued or the defendant resides in his district; and in such criminal cases, except felonies, as may be prescribed by law, and he shall have power to issue process for the arrest of all persons charged with felonies and misdemeanors not within his jurisdiction to try, and make the same returnable before himself or the county judge for examination, discharge, commitment or bail of the accused. Justices of the peace shall have the power to hold inquests of the dead. Appeal from justices of the peace courts in criminal cases may be tried de novo under such regulations as the legislature may prescribe.

(3) **CONSTABLES.** A constable shall be elected by the registered voters in each justice's district, who shall perform such duties, and under such regulations as may be prescribed by law.

History.—Am. H.J.R. 810, 1955; adopted, 1956.

SECTION 11A. Orange County; boundaries of Justice of Peace Districts.—The board of county commissioners of Orange County may at any time upon resolution, alter, change or revise the boundary of any justice of the peace district within Orange County without referendum; provided that no existing justice of the peace district shall be dissolved or otherwise eliminated except as otherwise provided by law. A public hearing shall be held on the proposed resolution with ten days' notice published in a newspaper of general circulation in the county.

History.—Added H.J.R. 746, 1965; adopted 1966.

SECTION 12. Juvenile Courts; establishment; jurisdiction; judge; officers; procedure.—The legislature shall have power to create and establish juvenile courts in such county or counties or districts within the state as it may deem proper, and to define the jurisdiction and powers of such courts and the officers thereof, and to vest in such courts exclusive original jurisdiction of all or any criminal cases where minors under any age specified by the legislature from time to time are accused, including the right to define any or all offenses committed by any such persons as acts of delin-

quency instead of crimes; to provide for the qualification, election or selection and appointment of judges, probation officers and such other officers and employees of such courts as the legislature may determine, and to fix their compensation and term of office; all in such manner, for such time, and according to such methods as the legislature may prescribe and determine, without being limited therein by the provisions in this constitution as to trial by jury in *Sections 3 and **11 of the Declaration of Rights, as to the use of the terms "prosecuting attorney" and "information" in ***Section 10 of the Declaration of Rights, as to election or appointment of officers in ****Section 27 of Article 3, as to jurisdiction of criminal cases in Sections 6, 7, 9, and 11 of this Article, as to original jurisdiction of the interests of minors in Section 6 of this Article, and as to style of process and prosecuting in the name of the state in Section 20 of this Article, or other existing conflicting provisions of this constitution.

History.—Am. H.J.R. 810, 1955; adopted 1956.

Note.—*§3 of D.R. now appears in 1968 revision as §22, Art. I.

Note.—**§11 of D.R. now appears in 1968 revision as §16, Art. I.

Note.—***§10 of D.R. now appears in 1968 revision as §16(a), Art. I.

Note.—****§27 of Art. III now appears in 1968 revision as §5(c) of Art. II; §1(b) Art. IV.

SECTION 13. Eligibility requirements for justices and judges.—No person shall be eligible for the office of justice of the supreme court or judge of a district court of appeal unless he is a citizen of this state, and unless he is, at the time, a member of the Florida Bar in good standing and for a period of at least ten years has been a member of the bar of Florida; and no person shall be eligible for the office of judge of a circuit court or criminal court of record who is not twenty-five years of age and a member of the bar of Florida. Any senator or member of the house of representatives otherwise qualified shall be eligible for appointment or election to any judicial office which may have been created, or the emoluments whereof may have been increased, during the time for which he was elected.

History.—Am. H.J.R. 810, 1955; adopted 1956.

SECTION 13A. Eligibility requirements for justices and certain judges.—

(1) No person shall be eligible for the office of justice of the supreme court or judge of a district court of appeal unless he is a citizen of this state, and unless he is, and for a period of ten years has been, a member of The Florida Bar; and no person shall be eligible for the office of judge of a circuit court unless he is a citizen of this state and unless he is, and for a period of five years has been, a member of The Florida Bar. The judges of other courts shall be citizens of this state and residents of the county served. Any senator or member of the house of representatives otherwise qualified shall be eligible for appointment or election to any judicial office, notwithstanding that it may have been created or its emoluments increased during the time for which he was elected.

History.—Added Com. Sub. for S.J.R. 485, 1965; adopted 1966.

SECTION 14. Vacancies in office of judge, how filled.—When the office of any judge shall become vacant from any cause, the successor to fill such vacancy shall be appointed or elected only for the unexpired term of the judge whose death, resignation, retirement, or other cause created such vacancy.

History.—Am. H.J.R. 810, 1955; adopted 1956.

SECTION 15. Election of judges.—Circuit judges shall be elected by the qualified electors of their respective judicial circuits as other state and county officials are elected.

Judges of district courts of appeal shall be elected by the qualified electors of their respective districts as other state and county officials are elected.

Justices of the supreme court shall be elected by the qualified electors of the state as other state and county officials are elected.

The judges of district courts of appeal identified as belonging to Group "A" shall be elected in 1958 and every six years thereafter; those identified as belonging to Group "B" shall be elected in 1960 and every six years thereafter; and those identified as belonging to Group "C" shall be elected in 1962 and every six years thereafter.

Election of circuit judges shall be held in the year 1960 and every six years thereafter.

Two justices of the supreme court shall be elected in 1958 and every six years thereafter; three justices of the supreme court shall be elected in 1960 and every six years thereafter; two justices of the supreme court shall be elected in 1962 and every six years thereafter.

Such elected justices and judges shall take office on the first Tuesday after the first Monday in the following January.

History.—Am. H.J.R. 810, 1955; adopted 1956.

SECTION 16. Terms of office of certain judges.—The terms of office of justices of the supreme court, judges of district courts of appeal, and circuit judges shall be six years.

History.—Am. H.J.R. 810, 1955; adopted 1956.

SECTION 17. Retirement, suspension and removal of judges.—Notwithstanding the provisions of this Article relating to terms of office:

(1) All justices and judges shall automatically retire at age 70;

(2) Subject to rules of procedure to be established by the supreme court, and after notice and hearing, any justice or judge may be retired for disability at retirement pay to be fixed by law, which shall not be less than two-thirds of his then compensation if he has served for ten years or more, by a commission composed of one justice of the supreme court to be selected by that court, two judges of the district courts of appeal to be selected by the judges of said district courts of appeal, and two circuit judges and two county judges to be selected by the supreme court.

(3) Any justice of the supreme court, judge of the district court of appeal, or circuit judge

shall be liable to impeachment for any misdemeanor in office.

History.—Am. H.J.R. 810, 1955; adopted 1956.

SECTION 17A. Discipline, retirement and removal of justices and certain judges.—

(1) Except as it provides for mandatory retirement, this section shall apply to every justice of the supreme court and judge of the district courts of appeal and circuit courts. It shall be the sole method of disciplining, automatically or involuntarily retiring or removing such justices or judges, provided that all such justices or judges shall be liable to impeachment for any misdemeanor in office. All justices and judges shall automatically retire at age seventy except those who held any judicial office on July 1, 1957; provided, however, that such mandatory retirement shall not prohibit a justice or judge from serving the entire term to which he was appointed or elected if he attains his seventieth birthday after serving at least one half of such term.

(2) There shall be a judicial qualifications commission composed of:

(a) Two judges of the district courts of appeal appointed by the judges of those courts and two circuit court judges appointed by the judges of those courts.

(b) Two members of The Florida Bar, who shall have practiced law in this state for at least eight years, appointed by the board of governors of The Florida Bar; and

(c) Three citizens, each of whom shall have been a resident of this state for at least five years, neither of whom shall be a justice or judge of any court, active or retired, nor a member of The Florida Bar, appointed by the governor. When a member appointed under paragraph (a) ceases to be a judge of the court from which he was appointed or a member appointed under paragraph (b) ceases to be a member of The Florida Bar, or a member appointed under paragraph (c) becomes a justice or judge of any court or a member of The Florida Bar, his membership on the commission shall terminate and a successor shall be appointed for the remainder of his term. No member of the commission appointed under paragraphs (b) or (c) shall be eligible to succeed himself. Except as provided herein, no member of the commission shall hold a public office and no member shall hold office in a political party. The compensation and terms of office of members of the commission shall be fixed by law, provided that not more than one third of the terms of the members shall terminate in any two year period. No recommendation of the commission to the supreme court shall be valid unless concurred in by two thirds of its members. The commission shall elect one of its members to serve as chairman.

(3) Any justice or judge to whom this section applies may be disciplined by private reprimand or removed from office for willful or persistent failure to perform his duties or habitual intemperance or conduct unbecoming a member of the judiciary or he may be involuntarily retired for disability seriously interfer-

ing with the performance of his duties, which is, or is likely to become, permanent in nature. After such investigation as it deems necessary, the judicial qualifications commission may conduct a hearing concerning the removal, discipline or retirement of a justice or judge or request the supreme court to appoint three special referees, who shall be active or retired justices or judges of courts of record, to hear and take evidence in any such matter, and to report thereon to the commission. All hearings shall be held in the county in which the justice or judge involved resides. Testimony shall be under oath, administered by a member of the commission or a special referee, and subject to the penalties for perjury. If after hearing, or after considering the record and report of the referees, the commission finds good cause therefor, it shall recommend to the supreme court the removal, discipline or retirement of the justice or judge. The supreme court shall review the record of the proceedings on the law and facts and shall order removal, discipline or retirement, as it finds just and proper, or wholly reject the commission's recommendation. Upon an order for involuntary retirement for disability, the justice or judge shall thereby be retired at retirement pay to be fixed by law which as to a justice of the supreme court, judge of a district court of appeal or circuit judge shall not be less than two thirds of his then compensation if he has served for ten years or more as justice or judge of such court or courts. Upon an order for removal, the justice or judge shall thereby be removed from office, and his salary shall cease from the date of such order. The supreme court shall make rules providing for the procedure before the commission and the referees and the extent to which communications shall be privileged or confidential, provided that upon the entry of an order of discipline, removal or retirement the record shall no longer remain confidential. A justice or judge shall be disqualified in any proceeding involving his own discipline, retirement or removal. The supreme court shall by rule provide for the disqualification of any member of the commission or referee and for the ad hoc appointment of a person to take the place of a disqualified person.

(4) In the event a judge is removed from office, his judicial service shall not provide immunity from disciplinary proceedings for professional misconduct performed during his term of office or prior thereto.

History.—Added S.J.R. 485, 1965; adopted 1966.

SECTION 18. Prohibited activities of judges.—Justices of the supreme court, judges of district courts of appeal and circuit judges shall devote full time to their judicial duties, shall not engage in the practice of law or hold any office or position of profit under this state or any office of profit under the United States, and shall not hold office in any political party.

Compensation for service in the state militia or the armed forces of the United States or other defense agencies recognized by the supreme court for such periods of time as may be

determined by the supreme court shall not be deemed profit.

History.—Am. H.J.R. 810, 1955; adopted 1956.

SECTION 19. Judicial salaries and expenses.—Justices of the supreme court and judges of all other courts shall receive for their services salaries or compensation provided by law. A retired justice or judge assigned to active judicial service shall, while so serving, receive as additional compensation the difference between his retirement benefits and the compensation applicable to such service. Salaries of circuit judges may be supplemented in any county or counties when authorized by law. Judicial officers shall be paid such actual and necessary expenses as may be authorized by law.

History.—Am. H.J.R. 810, 1955; adopted 1956.

SECTION 20. Style of process.—The style of all process shall be "The State of Florida" and all prosecutions shall be conducted in the name and by the authority of the State.

History.—Am. H.J.R. 810, 1955; adopted 1956.

SECTION 21. Referees.—Any civil cause may be tried before a practicing attorney as referee upon the applications of the parties and an order from the court in whose jurisdiction the case may be, authorizing such trial and appointing such referee. The referee shall keep a complete record of the case, including the evidence taken, and such record shall be filed with the papers in the case in the office of the clerk; and the cause shall be subject to an appeal in the manner prescribed by law.

History.—Am. H.J.R. 810, 1955; adopted 1956.

SECTION 22. Juries.—The number of jurors for trial of causes in any court may be fixed by law but shall not be less than six in any case.

History.—Am. H.J.R. 810, 1955; adopted 1956.

SECTION 23. Admission and discipline of attorneys.—The supreme court shall have exclusive jurisdiction over the admission to the practice of law and the discipline of persons admitted. It may provide for an agency to handle admissions subject to its supervision. It may also provide for the handling of disciplinary matters in the circuit courts and the district courts of appeal, or by commissions consisting of members of the bar to be designated by it, the supreme court, subject to its supervision and review.

History.—Am. H.J.R. 810, 1955; adopted 1956.

SECTION 24. Effect of reduction of number of judges.—Any law reducing the number of judges of any court shall not shorten the term of any judge then in office.

History.—Am. H.J.R. 810, 1955; adopted 1956.

SECTION 25. Judicial Officers as conservators of the peace. All judicial officers in this state shall be conservators of the peace.

History.—Am. H.J.R. 810, 1955; adopted 1956.

SECTION 26. Schedule.—

(1) This Article shall become effective on

the first day of July 1957 and shall replace all of Article V, and shall supersede any other provisions of the present constitution of Florida in conflict herewith, which shall then stand repealed.

(2) Until changed by law as authorized in this Article, the appellate districts shall be composed as follows:

FIRST DISTRICT:

The 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, and 14th judicial circuits as presently constituted.

SECOND DISTRICT:

The 6th, 9th, 10th, 12th, and 13th judicial circuits as presently constituted.

THIRD DISTRICT:

The 11th, 15th, and 16th judicial circuits as presently constituted.

(3) The provisions of the Article governing eligibility for office shall not affect the right of any incumbent to continue in office or to seek reelection.

(4) Except to the extent inconsistent with the provisions of this Article, all provisions of law and rules of court in force on the effective date of this Article shall continue in effect until superseded in a manner authorized by the constitution.

(5) Judges of the district courts of appeal appointed by the governor shall take office on the effective date of this Article.

(6) The supreme court may transfer to the respective district courts of appeal such causes, matters and proceedings as are pending in the supreme court on the effective date of this Article which are within the jurisdiction of such courts as the supreme court may see fit. No case that has been orally argued before the supreme court shall be so transferred. The supreme court shall have and retain jurisdiction and authority over all causes, matters and proceedings not so transferred to the district courts of appeal.

(7) All trial courts as organized and constituted on the effective date of this Article shall, except as otherwise provided herein, continue with their jurisdiction, judges and officers, including the manner of their election or appointment, until otherwise provided by the legislature.

(8) Until otherwise provided by law, there shall be an additional judge for the Fourth Judicial Circuit who shall reside in Duval County, and shall receive the same salary and allowances for expenses as other circuit judges in and for the circuit court of said county, which salary and expenses shall be paid by said county out of its general revenue. The additional judge of the circuit court of Duval County holding office on the effective date of this Article under former Section 42 of Article V shall become the additional judge here provided for until the expiration of his then term of office.

(9) There shall be an additional circuit judge for the circuit court of the judicial circuit wherein the state capital is located. Subsequent to the first Tuesday after the first Monday in January 1957, the governor shall appoint the first judge hereunder to serve for a term expiring on the first Tuesday after the first Monday in January 1959, following the election of his successor at the general election in November 1958, which successor shall serve for a term expiring on the first Tuesday after the first Monday in January 1961, following the election of his successor at the general election in November 1960, which successor shall serve for the full term and his successors chosen as otherwise provided for circuit judges.

(10) Until otherwise provided by the legislature, orders of the Florida Industrial Commission shall be subject to review only by petition to the district courts of appeal for writ of certiorari.

(11) All provisions of law pertaining to the State Board of Law Examiners shall continue in effect until superseded in a manner authorized by this Article.

(12) This Article shall not disturb the terms of incumbent judges.

(13) The provision for automatic retirement in Section 17 of this Article does not apply to any person now holding office.

(14) Upon the adoption of this Article, the legislature shall enact such laws and make such appropriations and the supreme court shall make such rules as may be necessary or proper to give effect to its provisions.

History.—Am. H. J. R. 810, 1955, adopted 1956.

ARTICLE VI

SUFFRAGE AND ELECTIONS.

Sec.

1. Regulation of elections.
2. Electors.
3. Oath.

SECTION 1. Regulation of elections.—All elections by the people shall be by direct and secret vote. General elections shall be determined by a plurality of votes cast. Registration and elections shall, and political party functions may, be regulated by law.

SECTION 2. Electors.—Every citizen of the United States who is at least twenty-one years of age and who has been a permanent resident

Sec.

4. Disqualifications.
5. General and special elections.
6. Municipal and district elections.

for one year in the state and six months in a county, if registered as provided by law, shall be an elector of that county. Provisions may be made by law for other bona fide residents of the state who are at least twenty-one years of age to vote in the election of presidential electors.

SECTION 3. Oath.—Each eligible citizen upon registering shall subscribe the following:

"I do solemnly swear (or affirm) that I will protect and defend the Constitution of the United States and the Constitution of the State of Florida, and that I am qualified to register as an elector under the Constitution and laws of the State of Florida."

SECTION 4. Disqualifications.—No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.

SECTION 5. General and special elections.—A general election shall be held in each county

on the first Tuesday after the first Monday in November of each even-numbered year to choose a successor to each elective state and county officer whose term will expire before the next general election and, except as provided herein, to fill each vacancy in elective office for the unexpired portion of the term. Special elections and referenda shall be held as provided by law.

SECTION 6. Municipal and district elections.—Registration and elections in municipalities shall, and in other governmental entities created by statute may, be provided by law.

ARTICLE VII

FINANCE AND TAXATION

Sec.

1. Taxation; appropriations; state expenses.
2. Taxes; rate.
3. Taxes; exemptions.
4. Taxation; assessments.
5. Estate, inheritance and income taxes.
6. Homestead exemptions.

SECTION 1. Taxation; appropriations; state expenses.—

(a) No tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. All other forms of taxation shall be preempted to the state except as provided by general law.

(b) Motor vehicles, boats, airplanes, trailers, trailer coaches and mobile homes, as defined by law, shall be subject to a license tax for their operation in the amounts and for the purposes prescribed by law, but shall not be subject to ad valorem taxes.

(c) No money shall be drawn from the treasury except in pursuance of appropriation made by law.

(d) Provision shall be made by law for raising sufficient revenue to defray the expenses of the state for each fiscal period.

SECTION 2. Taxes; rate.—All ad valorem taxation shall be at a uniform rate within each taxing unit, except the taxes on intangible personal property may be at different rates but shall never exceed two mills on the dollar of assessed value; provided, as to any obligations secured by mortgage, deed of trust, or other lien on real estate wherever located, an intangible tax of not more than two mills on the dollar may be levied by law to be in lieu of all other intangible assessments on such obligations.

SECTION 3. Taxes; exemptions.—

(a) All property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation. A municipality, owning property outside the municipality, may be required by general

Sec.

7. Allocation of pari-mutuel taxes.
8. Aid to local governments.
9. Local taxes.
10. Pledging credit.
11. State bonds; revenue bonds.
12. Local bonds.
13. Relief from illegal taxes.

law to make payment to the taxing unit in which the property is located. Such portions of property as are used predominantly for educational, literary, scientific, religious or charitable purposes may be exempted by general law from taxation.

(b) There shall be exempt from taxation, cumulatively, to every head of a family residing in this state, household goods and personal effects to the value fixed by general law, not less than one thousand dollars, and to every widow or person who is blind or totally and permanently disabled, property to the value fixed by general law not less than five hundred dollars.

SECTION 4. Taxation; assessments.—By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation, provided:

(a) Agricultural land or land used exclusively for non-commercial recreational purposes may be classified by general law and assessed solely on the basis of character or use.

(b) Pursuant to general law tangible personal property held for sale as stock in trade and livestock may be valued for taxation at a specified percentage of its value.

SECTION 5. Estate, inheritance and income taxes.—No tax upon estates or inheritances or upon the income of residents or citizens of the state shall be levied by the state, or under its authority, in excess of the aggregate of amounts which may be allowed to be credited upon or deducted from any similar tax levied by the United States or any state.

SECTION 6. Homestead exemptions.—

(a) Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon, except assessments for special benefits, up to the assessed valuation of five thousand dollars, upon establishment of right thereto in the manner prescribed by law. The real estate may be held by legal or equitable title, by the entireties, jointly, in common, as a condominium, or indirectly by stock ownership or membership representing the owner's or member's proprietary interest in a corporation owning a fee or a leasehold initially in excess of ninety-eight years.

(b) Not more than one exemption shall be allowed any individual or family unit or with respect to any residential unit. No exemption shall exceed the value of the real estate assessable to the owner or, in case of ownership through stock or membership in a corporation, the value of the proportion which his interest in the corporation bears to the assessed value of the property.

(c) By general law and subject to conditions specified therein, the exemption may be increased up to an amount not exceeding ten thousand dollars of the assessed value of the real estate if the owner has attained age sixty-five or is totally and permanently disabled.

SECTION 7. Allocation of pari-mutuel taxes.—Taxes upon the operation of pari-mutuel pools may be preempted to the state or allocated in whole or in part to the counties. When allocated to the counties, the distribution shall be in equal amounts to the several counties.

SECTION 8. Aid to local governments.—State funds may be appropriated to the several counties, school districts, municipalities or special districts upon such conditions as may be provided by general law.

SECTION 9. Local taxes.—

(a) Counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes, for their respective purposes, except ad valorem taxes on intangible personal property and taxes prohibited by this constitution.

(b) Ad valorem taxes, exclusive of taxes levied for the payment of bonds and taxes levied for periods not longer than two years when authorized by vote of the electors who are the owners of freeholds therein not wholly exempt from taxation, shall not be levied in excess of the following millages upon the assessed value of real estate and tangible personal property: for all county purposes, ten mills; for all municipal purposes, ten mills; for all school purposes, ten mills; and for special districts a millage authorized by law approved by vote of the electors who are

owners of freeholds therein not wholly exempt from taxation. A county furnishing municipal services may, to the extent authorized by law, levy additional taxes within the limits fixed for municipal purposes.

SECTION 10. Pledging credit.—Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership or person; but this shall not prohibit laws authorizing:

(a) the investment of public trust funds;

(b) the investment of other public funds in obligations of, or insured by, the United States or any of its instrumentalities;

(c) the issuance and sale by any county, municipality, special district or other local governmental body of (1) revenue bonds to finance or refinance the cost of capital projects for airports or port facilities, or (2) revenue bonds to finance or refinance the cost of capital projects for industrial or manufacturing plants to the extent that the interest thereon is exempt from income taxes under the then existing laws of the United States, when, in either case, the revenue bonds are payable solely from revenue derived from the sale, operation or leasing of the projects. If any project so financed, or any part thereof, is occupied or operated by any private corporation, association, partnership or person pursuant to contract or lease with the issuing body, the property interest created by such contract or lease shall be subject to taxation to the same extent as other privately owned property.

SECTION 11. State bonds; revenue bonds.—

(a) State bonds pledging the full faith and credit of the state may be issued only to finance or refinance the cost of state capital projects upon approval by a vote of the electors; provided state bonds issued pursuant to this subsection (a) may be refunded without a vote of the electors at a lower net average interest cost rate. The total outstanding principal of state bonds issued pursuant to this subsection (a) shall never exceed fifty per cent of the total tax revenues of the state for the two preceding fiscal years.

(b) Moneys sufficient to pay debt service on state bonds as the same becomes due shall be appropriated by law.

(c) Revenue bonds may be issued by the state or its agencies without a vote of the electors only to finance or refinance the cost of state capital projects and shall be payable solely from funds derived from sources other than state tax revenues or rents or fees paid from state tax revenues.

SECTION 12. Local bonds.—Counties, school districts, municipalities, special districts and local governmental bodies with taxing powers may issue bonds, certificates of indebtedness or any form of tax anticipation certificates, payable from ad valorem taxation

and maturing more than twelve months after issuance only:

(a) to finance or refinance capital projects authorized by law and only when approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation; or

(b) to refund outstanding bonds and in-

terest and redemption premium thereon at a lower net average interest cost rate.

SECTION 13. Relief from illegal taxes.—Until payment of all taxes which have been legally assessed upon the property of the same owner, no court shall grant relief from the payment of any tax that may be illegal or illegally assessed.

ARTICLE VIII

LOCAL GOVERNMENT

Sec.

1. Counties.
2. Municipalities.
3. Consolidation.

SECTION 1. Counties.—

(a) **POLITICAL SUBDIVISIONS.** The state shall be divided by law into political subdivisions called counties. Counties may be created, abolished or changed by law, with provision for payment or apportionment of the public debt.

(b) **COUNTY FUNDS.** The care, custody and method of disbursing county funds shall be provided by general law.

(c) **GOVERNMENT.** Pursuant to general or special law, a county government may be established by charter which shall be adopted, amended or repealed only upon vote of the electors of the county in a special election called for that purpose.

(d) **COUNTY OFFICERS.** There shall be elected by the electors of each county, for terms of four years, a sheriff, a tax collector, a tax assessor, a supervisor of elections, and a clerk of the circuit court; except, when provided by county charter or special law approved by vote of the electors of the county, any county officer may be chosen in another manner therein specified, or any county office may be abolished when all the duties of the office prescribed by general law are transferred to another office. When not otherwise provided by county charter or special law approved by vote of the electors, the clerk of the circuit court shall be ex officio clerk of the board of county commissioners, auditor, recorder and custodian of all county funds.

(e) **COMMISSIONERS.** Except when otherwise provided by county charter, the governing body of each county shall be a board of county commissioners composed of five members serving staggered terms of four years. After each decennial census the board of county commissioners shall divide the county into districts of contiguous territory as nearly equal in population as practicable. One commissioner residing in each district shall be elected by the electors of the county.

(f) **NON-CHARTER GOVERNMENT.** Counties not operating under county charters shall have such power of self-government as is provided by general or special law. The board of county commissioners of a county not operating under a charter may enact, in a manner

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prescribed by general law, county ordinances not inconsistent with general or special law, but an ordinance in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict.

(g) **CHARTER GOVERNMENT.** Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.

(h) **TAXES; LIMITATION.** Property situated within municipalities shall not be subject to taxation for services rendered by the county exclusively for the benefit of the property or residents in unincorporated areas.

(i) **COUNTY ORDINANCES.** Each county ordinance shall be filed with the secretary of state and shall become effective at such time thereafter as is provided by general law.

(j) **VIOLATION OF ORDINANCES.** Persons violating county ordinances shall be prosecuted and punished as provided by law.

(k) **COUNTY SEAT.** In every county there shall be a county seat at which shall be located the principal offices and permanent records of all county officers. The county seat may not be moved except as provided by general law. Branch offices for the conduct of county business may be established elsewhere in the county by resolution of the governing body of the county in the manner prescribed by law. No instrument shall be deemed recorded in the county until filed at the county seat according to law.

SECTION 2. Municipalities.—

(a) **ESTABLISHMENT.** Municipalities may be established or abolished and their charters amended pursuant to general or special law. When any municipality is abolished, provision shall be made for the protection of its creditors.

(b) **POWERS.** Municipalities shall have governmental, corporate and proprietary powers

to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective.

(c) **ANNEXATION.** Municipal annexation of unincorporated territory, merger of municipalities, and exercise of extra-territorial powers by municipalities shall be as provided by general or special law.

SECTION 3. Consolidation.—The government of a county and the government of one or more municipalities located therein may be consolidated into a single government which may exercise any and all powers of the county and the several municipalities. The consolidation plan may be proposed only by special law, which shall become effective if approved by vote of the electors of the county, or of the county and municipalities affected, as may be provided in the plan. Consolidation shall not extend the territorial scope of taxation for the payment of pre-existing debt except to areas whose residents receive a benefit from the facility or service for which the indebtedness was incurred.

SECTION 4. Transfer of powers.—By law or by resolution of the governing bodies of each of the governments affected, any function or power of a county, municipality or special district may be transferred to or contracted to be performed by another county, municipality or special district, after approval by vote of the electors of the transferor and approval by vote of the electors of the transferee, or as otherwise provided by law.

SECTION 5. Local option.—Local option on the legality or prohibition of the sale of intoxicating liquors, wines or beers shall be preserved to each county. The status of a county with respect thereto shall be changed only by vote of the electors in a special election called upon the petition of twenty-five per cent of the electors of the county, and not sooner than two years after an earlier election on the same question. Where legal, the sale of intoxicating liquors, wines and beers shall be regulated by law.

SECTION 6. Schedule.—

(a) This article shall replace all of Article VIII of the Constitution of 1885, as amended, except those sections expressly retained and made a part of this article by reference.

(b) **COUNTIES; COUNTY SEATS; MUNICIPALITIES; DISTRICTS.** The status of the following items as they exist on the date this article becomes effective is recognized and shall be continued until changed in accordance with law: the counties of the state; their status with respect to the legality of the sale of intoxicating liquors, wines and beers; the method of selection of county officers; the performance of municipal functions by county officers; the county seats; and the municipalities and special

districts of the state, their powers, jurisdiction and government.

(c) **OFFICERS TO CONTINUE IN OFFICE.** Every person holding office when this article becomes effective shall continue in office for the remainder of the term if that office is not abolished. If the office is abolished the incumbent shall be paid adequate compensation, to be fixed by law, for the loss of emoluments for the remainder of the term.

(d) **ORDINANCES.** Local laws relating only to unincorporated areas of a county on the effective date of this article may be amended or repealed by county ordinance.

(e) **CONSOLIDATION AND HOME RULE.** Article VIII, Sections *9, **10, ***11 and ****24, of the Constitution of 1885, as amended, shall remain in full force and effect as to each county affected, as if this article had not been adopted, until that county shall expressly adopt a charter or home rule plan pursuant to this article. All provisions of the Metropolitan Dade County Home Rule Charter, heretofore or hereafter adopted by the electors of Dade County pursuant to ***Article VIII, Section 11, of the Constitution of 1885, as amended, shall be valid, and any amendments to such charter shall be valid; provided that the said provisions of such charter and the said amendments thereto are authorized under said ***Article VIII, Section 11, of the Constitution of 1885, as amended.

(f) **DADE COUNTY; POWERS CONFERRED UPON MUNICIPALITIES.** To the extent not inconsistent with the powers of existing municipalities or general law, the Metropolitan Government of Dade County may exercise all the powers conferred now or hereafter by general law upon municipalities.

(g) **DELETION OF OBSOLETE SCHEDULE ITEMS.** The legislature shall have power, by joint resolution, to delete from this article any subsection of this Section 6, including this subsection, when all events to which the subsection to be deleted is or could become applicable have occurred. A legislative determination of fact made as a basis for application of this subsection shall be subject to judicial review.

*Note.—Section 9 of Art. VIII of the Constitution of 1885, as amended, reads as follows:

SECTION 9. Legislative power over city of Jacksonville and Duval County.—The Legislature shall have power to establish, alter or abolish, a Municipal corporation to be known as the City of Jacksonville, extending territorially throughout the present limits of Duval County, in the place of any or all county, district, municipal and local governments, boards, bodies and officers, constitutional or statutory, legislative, executive, judicial, or administrative, and shall prescribe the jurisdiction, powers, duties and functions of such municipal corporation, its legislative, executive, judicial and administrative departments and its boards, bodies and officers; to divide the territory included in such municipality into subordinate districts, and to prescribe a just and reasonable system of taxation for such municipality and districts; and to fix the liability of such municipality and districts. Bonded and other indebtedness, existing at the time of the establishment of such municipality, shall be enforceable only against property theretofore taxable therefor. The Legislature shall, from time to time, determine what portion of said municipality is a rural area, and a homestead in such rural area shall not be limited as if in a city or town. Such municipality may exercise all the powers of a municipal corporation and shall also be recognized as one of the legal political divisions of the State with the duties and obligations of a county and shall be entitled to all the powers, rights and privileges, including representation in the State Legislature.

which would accrue to it if it were a county. All property of Duval County and of the municipalities in said county shall vest in such municipal corporation when established as herein provided. The offices of Clerk of the Circuit Court and Sheriff shall not be abolished but the Legislature may prescribe the time when, and the method by which, such offices shall be filled and the compensation to be paid to such officers and may vest in them additional powers and duties. No county office shall be abolished or consolidated with another office without making provision for the performance of all State duties now or hereafter prescribed by law to be performed by such county officer. Nothing contained herein shall affect Section 20 of Article III of the Constitution of the State of Florida, except as to such provisions therein as relate to regulating the jurisdiction and duties of any class of officers, to summoning and impanelling grand and petit jurors, to assessing and collecting taxes for county purposes and to regulating the fees and compensation of county officers. No law authorizing the establishing or abolishing of such Municipal corporation pursuant to this Section, shall become operative or effective until approved by a majority of the qualified electors participating in an election held in said County, but so long as such Municipal corporation exists under this Section the Legislature may amend or extend the law authorizing the same without referendum to the qualified voters unless the Legislative act providing for such amendment or extension shall provide for such referendum.

History.—Added, S.J.R. 113, 1933; adopted 1934.

****Note.**—Section 10, Art. VIII of the Constitution of 1885, as amended, reads as follows:

SECTION 10. Legislative power over city of Key West and Monroe county.—The Legislature shall have power to establish, alter or abolish, a Municipal corporation to be known as the City of Key West, extending territorially throughout the present limits of Monroe County, in the place of any or all county, district, municipal and local governments, boards, bodies and officers, constitutional or statutory, legislative, executive, judicial, or administrative, and shall prescribe the jurisdiction, powers, duties and functions of such municipal corporation, its legislative, executive, judicial and administrative departments and its boards, bodies and officers; to divide the territory included in such municipality into subordinate districts, and to prescribe a just and reasonable system of taxation for such municipality and districts; and to fix the liability of such municipality and districts. Bonded and other indebtedness, existing at the time of the establishment of such municipality, shall be enforceable only against property theretofore taxable therefor. The Legislature shall, from time to time, determine what portion of said municipality is a rural area, and a home-stead in such rural area shall not be limited as if in a city or town. Such municipality may exercise all the powers of a municipal corporation and shall also be recognized as one of the legal political divisions of the State with the duties and obligations of a county and shall be entitled to all the powers, rights and privileges including representation in the State Legislature, which would accrue to it if it were a county. All property of Monroe County and of the municipality in said county shall vest in such municipal corporation when established as herein provided. The offices of Clerk of the Circuit Court and Sheriff shall not be abolished but the Legislature may prescribe the time when, and the method by which, such offices shall be filled and the compensation to be paid to such officers and may vest in them additional powers and duties. No county office shall be abolished or consolidated with another office without making provision for the performance of all State duties now or hereafter prescribed by law to be performed by such county officer. Nothing contained herein shall affect Section 20 of Article III of the Constitution of the State of Florida, except as to such provisions therein as relate to regulating the jurisdiction and duties of any class of officers, to summoning and impanelling grand and petit juries, to assessing and collecting taxes for county purposes and to regulating the fees and compensation of county officers. No law authorizing the establishing or abolishing of such Municipal corporation pursuant to this Section shall become operative or effective until approved by a majority of the qualified electors participating in an election held in said County, but so long as such Municipal corporation exists under this Section the Legislature may amend or extend the law authorizing the same without referendum to the qualified voters unless the Legislative Act providing for such amendment or extension shall provide for such referendum.

History.—Added, S.J.R. 429, 1935; adopted 1936.

****Note.**—Section 11 of Art. VIII of the Constitution of 1885, as amended, reads as follows:

SECTION 11. Dade County, home rule charter.—(1) The electors of Dade County, Florida, are granted power to adopt, revise, and amend from time to time a home rule charter of government for Dade County, Florida, under which the Board of County Commissioners of Dade County shall be the governing body. This charter:

(a) Shall fix the boundaries of each county commission district, provide a method for changing them from time to time, and fix the number, terms and compensation of the commissioners, and their method of election.

(b) May grant full power and authority to the Board of

County Commissioners of Dade County to pass ordinances relating to the affairs, property and government of Dade County and provide suitable penalties for the violation thereof; to levy and collect such taxes as may be authorized by general law and no other taxes, and to do everything necessary to carry on a central metropolitan government in Dade County.

(c) May change the boundaries of, merge, consolidate, and abolish and may provide a method for changing the boundaries of, merging, consolidating and abolishing from time to time all municipal corporations, county or district governments, special taxing districts, authorities, boards, or other governmental units whose jurisdiction lies wholly within Dade County, whether such governmental units are created by the Constitution or the Legislature or otherwise, except the Dade County Board of County Commissioners as it may be provided for from time to time by this home rule charter and the Board of Public Instruction of Dade County.

(d) May provide a method by which any and all of the functions or powers of any municipal corporation or other governmental unit in Dade County may be transferred to the Board of County Commissioners of Dade County.

(e) May provide a method for establishing new municipal corporations, special taxing districts, and other governmental units in Dade County from time to time and provide for their government and prescribe their jurisdiction and powers.

(f) May abolish and may provide a method for abolishing from time to time all offices provided for by Article VIII, Section 6, of the Constitution or by the Legislature, except the Superintendent of Public Instruction and may provide for the consolidation and transfer of the functions of such offices, provided, however, that there shall be no power to abolish or impair the jurisdiction of the Circuit Court or to abolish any other court provided for by this Constitution or by general law, or the judges or clerks thereof although such charter may create new courts and judges and clerks thereof with jurisdiction to try all offenses against ordinances passed by the Board of County Commissioners of Dade County and none of the other courts provided for by this Constitution or by general law shall have original jurisdiction to try such offenses, although the charter may confer appellate jurisdiction on such courts, and provided further that if said home rule charter shall abolish any county office or offices as authorized herein, that said charter shall contain adequate provision for the carrying on of all functions of said office or offices as are now or may hereafter be prescribed by general law.

(g) Shall provide a method by which each municipal corporation in Dade County shall have the power to make, amend or repeal its own charter. Upon adoption of this home rule charter by the electors this method shall be exclusive and the Legislature shall have no power to amend or repeal the charter of any municipal corporation in Dade County.

(h) May change the name of Dade County.

(i) Shall provide a method for the recall of any commissioner and a method for initiative and referendum, including the initiation of and referendum on ordinances and the amendment or revision of any home rule charter, provided, however, that the power of the Governor and Senate relating to the suspension and removal of officers provided for in this Constitution shall not be impaired, but shall extend to all officers provided for in said home rule charter.

(2) Provision shall be made for the protection of the creditors of any governmental unit which is merged, consolidated, or abolished or whose boundaries are changed or functions or powers transferred.

(3) This home rule charter shall be prepared by a Metropolitan Charter Board created by the Legislature and shall be presented to the electors of Dade County for ratification or rejection in the manner provided by the Legislature. Until a home rule charter is adopted the Legislature may from time to time create additional Charter Boards to prepare charters to be presented to the electors of Dade County for ratification or rejection in the manner provided by the Legislature. Such Charter, once adopted by the electors, may be amended only by the electors of Dade County and this charter shall provide a method for submitting future charter revisions and amendments to the electors of Dade County.

(4) The County Commission shall continue to receive its pro rata share of all revenues payable by the state from whatever source to the several counties and the state of Florida shall pay to the Commission all revenues which would have been paid to any municipality in Dade County which may be abolished by or in the method provided by this home rule charter; provided, however, the Commission shall reimburse the comptroller of Florida for the expense incurred if any, in the keeping of separate records to determine the amounts of money which would have been payable to any such municipality.

(5) Nothing in this section shall limit or restrict the power of the Legislature to enact general laws which shall relate to Dade County and any other one or more counties in the state of Florida or to any municipality in Dade County and any other one or more municipalities of the State of Florida, and the home rule charter provided for herein shall not conflict with any provision of this Constitution nor of any applicable general laws now applying to Dade County and any other one or more counties of the State of Florida except as expressly authorized in this section nor shall any ordinance enacted in pursuance to said home rule charter conflict with this Constitution or

any such applicable general law except as expressly authorized herein, nor shall the charter of any municipality in Dade County conflict with this Constitution or any such applicable general law except as expressly authorized herein, provided however that said charter and said ordinances enacted in pursuance thereof may conflict with, modify or nullify any existing local, special or general law applicable only to Dade County.

(6) Nothing in this section shall be construed to limit or restrict the power of the Legislature to enact general laws which shall relate to Dade County and any other one or more counties of the state of Florida or to any municipality in Dade County and any other one or more municipalities of the State of Florida relating to county or municipal affairs and all such general laws shall apply to Dade County and to all municipalities therein to the same extent as if this section had not been adopted and such general laws shall supersede any part or portion of the home rule charter provided for herein in conflict therewith and shall supersede any provision of any ordinance enacted pursuant to said charter and in conflict therewith, and shall supersede any provision of any charter of any municipality in Dade County in conflict therewith.

(7) Nothing in this section shall be construed to limit or restrict the power and jurisdiction of the Railroad and Public Utilities Commission or of any other state agency, bureau or commission now or hereafter provided for in this Constitution or by general law and said state agencies, bureaus and commissions shall have the same powers in Dade County as shall be conferred upon them in regard to other counties.

(8) If any section, subsection, sentence, clause or provisions of this section is held invalid as violative of the provisions of Section 1 Article XVII of this Constitution the remainder of this section shall not be affected by such invalidity.

(9) It is declared to be the intent of the Legislature and of the electors of the State of Florida to provide by this section home rule for the people of Dade County in local affairs and this section shall be liberally construed to carry out such purpose, and it is further declared to be the intent of the Legislature and of the electors of the State of Florida that the provisions of this Constitution and general laws which shall relate to Dade County and any other one or more counties of the State of Florida or to any municipality in Dade County and any other one or more municipalities of the State of Florida enacted pursuant thereto by the Legislature shall be the supreme law in Dade County, Florida, except as expressly provided herein and this section shall be strictly construed to maintain such supremacy of this Constitution and of the Legislature in the enactment of general laws pursuant to this Constitution.

History.—Added, H. J. R. 858, 1941; adopted 1942; am. S. J. R. 1046, 1955; adopted, 1956.

***Note.—Section 24 of Art. VIII of the Constitution of 1885, as amended, reads as follows:

SECTION 24. Hillsborough County, home rule charter.—

(1) The electors of Hillsborough county are hereby granted the power to adopt a charter for a government which shall exercise any and all powers for county and municipal purposes which this constitution or the legislature, by general, special or local law, has conferred upon Hillsborough county or any municipality therein. Such government shall exercise these powers by the enactment of ordinances which relate to government of Hillsborough county and provide suitable penalties for the violation thereof. Such government shall have no power to create or abolish any municipality, except as otherwise provided herein.

(2) The method and manner by which the electors of Hillsborough county shall exercise this power shall be set forth in a charter for the government of Hillsborough county which charter shall be presented to said electors by any charter com-

mission established by the legislature. The legislature may provide for the continuing existence of any charter commission or may establish a charter commission or commissions subsequent to any initial commission without regard to any election or elections held upon any charter or charters theretofore presented. A charter shall become effective only upon ratification by a majority of the electors of Hillsborough county voting in a general or special election as provided by law.

(3) The number, qualifications, terms of office and method of filling vacancies in the membership of any charter commission established pursuant to this section and the powers, functions and duties of any such commission shall be provided by law.

(4) A charter prepared by any commission established pursuant to this section shall provide that:

(a) The governments of the city of Tampa and the county of Hillsborough shall be consolidated, and the structure of the new local government shall include:

1. An executive branch, the chief officer of which shall be responsible for the administration of government.

2. An elected legislative branch, the election to membership, powers and duties of which shall be as provided by the charter.

3. A judicial branch, which shall only have jurisdiction in the enforcement of ordinances enacted by the legislative branch created by this section.

(b) Should the electors of the municipalities of Plant City or Temple Terrace wish to consolidate their governments with the government hereinabove created, they may do so by majority vote of the electors of said municipality voting in an election upon said issue.

(c) The creditors of any governmental unit consolidated or abolished under this section shall be protected. Bonded or other indebtedness existing at the effective date of any government established hereunder shall be enforceable only against the real and personal property theretofore taxable for such purposes.

(d) Such other provisions as might be required by law.

(5) The provisions of such charter and ordinances enacted pursuant thereto shall not conflict with any provision of this constitution nor with general, special or local laws now or hereafter applying to Hillsborough county.

(6) The government established hereunder shall be recognized as a county, that is one of the legal political subdivisions of the state with the powers, rights, privileges, duties and obligations of a county, and may also exercise all the powers of a municipality. Said government shall have the right to sue and be sued.

(7) Any government established hereunder shall be entitled to receive from the state of Florida or from the United States or from any other agency, public or private, funds and revenues to which a county is, or may hereafter be entitled, and also all funds and revenues to which an incorporated municipality is or may hereafter be entitled, and to receive the same without diminution or loss by reason of any such government as may be established. Nothing herein contained shall preclude such government as may be established hereunder from receiving all funds and revenues from whatever source now received, or hereinafter received provided by law.

(8) The board of county commissioners of Hillsborough county shall be abolished when the functions, duties, powers and responsibilities of said board shall be transferred in the manner to be provided by the charter to the government established pursuant to this section. No other office provided for by this constitution shall be abolished by or pursuant to this section.

(9) This section shall not restrict or limit the legislature in the enactment of general, special or local laws as otherwise provided in this constitution.

History.—Added Com. Sub. for H.J.R. 1987, 1965; adopted 1966.

ARTICLE IX

EDUCATION

Sec.

1. System of public education.
2. State board of education.
3. Terms of appointive board members.

SECTION 1. System of public education.—Adequate provision shall be made by law for a uniform system of free public schools and for the establishment, maintenance and operation of institutions of higher learning and other public education programs that the needs of the people may require.

SECTION 2. State board of education.—The governor and the members of the cabinet shall

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constitute a state board of education, which shall be a body corporate and have such supervision of the system of public education as is provided by law.

SECTION 3. Terms of appointive board members.—Members of any appointive board dealing with education may serve terms in excess of four years as provided by law.

SECTION 4. School districts; school

boards.—

(a) Each county shall constitute a school district; provided, two or more contiguous counties, upon vote of the electors of each county pursuant to law, may be combined into one school district. In each school district there shall be a school board composed of five or more members chosen by vote of the electors for appropriately staggered terms of four years, as provided by law.

(b) The school board shall operate, control and supervise all free public schools within the school district and determine the rate of school district taxes within the limits prescribed herein. Two or more school districts may operate and finance joint educational programs.

SECTION 5. Superintendent of schools.—

In each school district there shall be a superintendent of schools. He shall be elected at the general election in each year the number of which is a multiple of four for a term of four years; or, when provided by resolution of the district school board, or by special law, approved by vote of the electors, the district school superintendent in any school district shall be employed by the district school board as provided by general law. The resolution or special law may be rescinded or repealed by either procedure after four years.

SECTION 6. State school fund.—The income derived from the state school fund shall, and the principal of the fund may, be appropriated, but only to the support and maintenance of free public schools.

ARTICLE X**MISCELLANEOUS****Sec.**

1. Amendments to United States Constitution.
2. Militia.
3. Vacancy in office.
4. Homestead; exemptions.
5. Coverture and property.
6. Eminent domain.

SECTION 1. Amendments to United States Constitution.—The legislature shall not take action on any proposed amendment to the constitution of the United States unless a majority of the members thereof have been elected after the proposed amendment has been submitted for ratification.

SECTION 2. Militia.—

(a) The militia shall be composed of all able-bodied inhabitants of the state who are or have declared their intention to become citizens of the United States; and no person because of religious creed or opinion shall be exempted from military duty except upon conditions provided by law.

(b) The organizing, equipping, housing, maintaining, and disciplining of the militia, and the safekeeping of public arms may be provided for by law.

(c) The governor shall appoint all commissioned officers of the militia, including an adjutant general who shall be chief of staff. The appointment of all general officers shall be subject to confirmation by the senate.

(d) The qualifications of personnel and officers of the federally recognized national guard, including the adjutant general, and the grounds and proceedings for their discipline and removal shall conform to the appropriate United States army or air force regulations and usages.

SECTION 3. Vacancy in office.—Vacancy in office shall occur upon the creation of an office, upon the death of the incumbent or his removal from office, resignation, succession to another office, unexplained absence for sixty consecutive

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days, or failure to maintain the residence required when elected or appointed, and upon failure of one elected or appointed to office to qualify within thirty days from the commencement of the term.

SECTION 4. Homestead; exemptions.—

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by the head of a family:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family;

(2) personal property to the value of one thousand dollars.

(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the

spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

SECTION 5. Coverture and property.—There shall be no distinction between married women and married men in the holding, control, disposition, or encumbering of their property, both real and personal; except that dower or curtesy may be established and regulated by law.

SECTION 6. Eminent domain.—

(a) No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.

(b) Provision may be made by law for the taking of easements, by like proceedings, for the drainage of the land of one person over or through the land of another.

SECTION 7. Lotteries.—Lotteries, other than the types of pari-mutuel pools authorized by law as of the effective date of this constitution, are hereby prohibited in this state.

SECTION 8. Census.—

(a) Each decennial census of the state taken by the United States shall be an official census of the state.

(b) Each decennial census, for the purpose of classifications based upon population, shall become effective on the thirtieth day after the final adjournment of the regular session of the legislature convened next after certification of the census.

SECTION 9. Repeal of criminal statutes.—Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.

SECTION 10. Felony; definition.—The term "felony" as used herein and in the laws of this state shall mean any criminal offense that is punishable under the laws of this state,

or that would be punishable if committed in this state, by death or by imprisonment in the state penitentiary.

SECTION 11. Sovereignty Lands.—The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Sale or private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.

SECTION 12. Rules of construction.—Unless qualified in the text the following rules of construction shall apply to this constitution.

(a) "Herein" refers to the entire constitution.

(b) The singular includes the plural.

(c) The masculine includes the feminine.

(d) "Vote of the electors" means the vote of the majority of those voting on the matter in an election, general or special, in which those participating are limited to the electors of the governmental unit referred to in the text.

(e) Vote or other action of a legislative house or other governmental body means the vote or action of a majority or other specified percentage of those members voting on the matter. "Of the membership" means "of all members thereof."

(f) The terms "judicial office," "justices" and "judges" shall not include judges of courts established solely for the trial of violations of ordinances.

(g) "Special law" means a special or local law.

(h) Titles and subtitles shall not be used in construction.

SECTION 13. Suits against the state.—Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.

ARTICLE XI AMENDMENTS

Sec.

1. Proposal by legislature.
2. Revision commission.
3. Initiative.

SECTION 1. Proposal by legislature.—Amendment of a section or revision of one or more articles, or the whole, of this constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the legislature. The full text of the joint resolution and the vote of each member voting shall be entered on the journal of each house.

SECTION 2. Revision commission.—

(a) Within thirty days after the adjournment of the regular session of the legislature

Sec.

4. Constitutional convention.
5. Amendment or revision election.

convened in the tenth year following that in which this constitution is adopted, and each twentieth year thereafter, there shall be established a constitution revision commission composed of the following thirty-seven members:

- (1) the attorney general of the state;
- (2) fifteen members selected by the governor;
- (3) nine members selected by the speaker of the house of representatives and nine members selected by the president of the senate; and
- (4) three members selected by the chief

justice of the supreme court of Florida with the advice of the justices.

(b) The governor shall designate one member of the commission as its chairman. Vacancies in the membership of the commission shall be filled in the same manner as the original appointments.

(c) Each constitution revision commission shall convene at the call of its chairman, adopt its rules of procedure, examine the constitution of the state, hold public hearings, and, not later than one hundred eighty days prior to the next general election, file with the secretary of state its proposal, if any, of a revision of this constitution or any part of it.

SECTION 3. Initiative.—The power to propose amendments to any section of this constitution by initiative is reserved to the people. It may be invoked by filing with the secretary of state a petition containing a copy of the proposed amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight per cent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen.

SECTION 4. Constitutional convention.—

(a) The power to call a convention to consider a revision of the entire constitution is reserved to the people. It may be invoked by filing with the secretary of state a petition, containing a declaration that a constitutional convention is desired, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to fifteen per cent of the votes cast in each such district respectively and in the state as a whole in the last preceding election of presidential electors.

(b) At the next general election held more than ninety days after the filing of such petition there shall be submitted to the electors of the state the question: "Shall a constitu-

tional convention be held?" If a majority voting on the question votes in the affirmative, at the next succeeding general election there shall be elected from each representative district a member of a constitutional convention. On the twenty-first day following that election, the convention shall sit at the capital, elect officers, adopt rules of procedure, judge the election of its membership, and fix a time and place for its future meetings. Not later than ninety days before the next succeeding general election, the convention shall cause to be filed with the secretary of state any revision of this constitution proposed by it.

SECTION 5. Amendment or revision election.—

(a) A proposed amendment to or revision of this constitution, or any part of it, shall be submitted to the electors at the next general election held more than ninety days after the joint resolution, initiative petition or report of revision commission or constitutional convention proposing it is filed with the secretary of state, unless, pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the legislature and limited to a single amendment or revision, it is submitted at an earlier special election held more than ninety days after such filing.

(b) Once in the tenth week, and once in the sixth week immediately preceding the week in which the election is held, the proposed amendment or revision, with notice of the date of election at which it will be submitted to the electors, shall be published in one newspaper of general circulation in each county in which a newspaper is published.

(c) If the proposed amendment or revision is approved by vote of the electors, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.

ARTICLE XII

SCHEDULE

Sec.

1. Constitution of 1885 superseded.
2. Property taxes; millages.
3. Officers to continue in office.
4. State commissioner of education.
5. Superintendent of schools.
6. Laws preserved.
7. Rights reserved.
8. Public debts recognized.
9. Bonds.

SECTION 1. Constitution of 1885 superseded.—Articles I through IV, VII, and IX through XX of the Constitution of Florida adopted in 1885, as amended from time to time, are superseded by this revision except those sections expressly retained and made a part

Sec.

10. Preservation of existing government.
11. Deletion of obsolete schedule items.
12. Senators.
13. Legislative apportionment.
14. Representatives; terms.
15. Special district taxes.
16. Reorganization.
17. Conflicting provisions.

of this revision by reference.

SECTION 2. Property taxes; millages.—Tax millages authorized in counties, municipalities and special districts, on the date this revision becomes effective, may be continued until reduced by law.

SECTION 3. Officers to continue in office.—Every person holding office when this revision becomes effective shall continue in office for the remainder of the term if that office is not abolished. If the office is abolished the incumbent shall be paid adequate compensation, to be fixed by law, for the loss of emoluments for the remainder of the term.

SECTION 4. State commissioner of education.—The state superintendent of public instruction in office on the effective date of this revision shall become and, for the remainder of the term being served, shall be the commissioner of education.

SECTION 5. Superintendent of schools.—

(a) On the effective date of this revision the county superintendent of public instruction of each county shall become and, for the remainder of the term being served, shall be the superintendent of schools of that district.

(b) The method of selection of the county superintendent of public instruction of each county, as provided by or under the Constitution of 1885, as amended, shall apply to the selection of the district superintendent of schools until changed as herein provided.

SECTION 6. Laws preserved.—

(a) All laws in effect upon the adoption of this revision, to the extent not inconsistent with it, shall remain in force until they expire by their terms or are repealed.

(b) All statutes which, under the Constitution of 1885, as amended, apply to the state superintendent of public instruction and those which apply to the county superintendent of public instruction shall under this revision apply, respectively, to the state commissioner of education and the district superintendent of schools.

SECTION 7. Rights reserved.—

(a) All actions, rights of action, claims, contracts and obligations of individuals, corporations and public bodies or agencies existing on the date this revision becomes effective shall continue to be valid as if this revision had not been adopted. All taxes, penalties, fines and forfeitures owing to the state under the Constitution of 1885, as amended, shall inure to the state under this revision, and all sentences as punishment for crime shall be executed according to their terms.

(b) This revision shall not be retroactive so as to create any right or liability which did not exist under the Constitution of 1885, as amended, based upon matters occurring prior to the adoption of this revision.

SECTION 8. Public debts recognized.—All bonds, revenue certificates, revenue bonds and tax anticipation certificates issued pursuant to the Constitution of 1885, as amended by the state, any agency, political subdivision or public corporation of the state shall remain in full force and effect and shall be secured by the same sources of revenue as before the adop-

tion of this revision, and, to the extent necessary to effectuate this section, the applicable provisions of the Constitution of 1885, as amended, are retained as a part of this revision until payment in full of these public securities.

SECTION 9. Bonds.—

(a) **ADDITIONAL SECURITIES.** No additional revenue bonds shall be issued pursuant to Article IX, Section 17, of the Constitution of 1885, as amended. *Article XII, Section 19, of the Constitution of 1885, as amended, as it existed immediately before this revision becomes effective, is adopted by this reference as a part of this revision as completely as though incorporated herein verbatim, except bonds or tax anticipation certificates hereafter issued thereunder may bear interest not in excess of five per cent per annum or such higher interest as may be authorized by statute passed by a three-fifths vote of each house of the legislature. No revenue bonds or tax anticipation certificates shall be issued pursuant thereto after June 30, 1969.

(b) **REFUNDING BONDS.** Revenue bonds to finance the cost of state capital projects issued prior to the date this revision becomes effective, including projects of the Florida state turnpike authority or its successor but excluding all portions of the state highway system, may be refunded as provided by law without vote of the electors at a lower net average interest cost rate by the issuance of bonds maturing not later than the obligations refunded, secured by the same revenues only.

(c) **MOTOR VEHICLE FUEL TAXES.**

(1) A state tax, designated "second gas tax," of two cents per gallon upon gasoline and other like products of petroleum and an equivalent tax upon other sources of energy used to propel motor vehicles as levied by **Article IX, Section 16, of the Constitution of 1885, as amended, is hereby continued for a period of forty consecutive years. The proceeds of said tax shall be placed monthly in the state roads distribution fund in the state treasury.

(2) **Article IX, Section 16, of the Constitution of 1885, as amended, is adopted by this reference as a part of this revision as completely as though incorporated herein verbatim for the purpose of providing that after the effective date of this revision the proceeds of the "second gas tax" as referred to therein shall be allocated among the several counties in accordance with the formula stated therein to the extent necessary to comply with all obligations to or for the benefit of holders of bonds, revenue certificates and tax anticipation certificates or any refundings thereof secured by any portion of the "second gas tax."

(3) No funds anticipated to be allocated under the formula stated in **Article IX, Section 16, of the Constitution of 1885, as amended, shall be pledged as security for any obligation hereafter issued or entered into, except that any outstanding obligations pre-

viously issued pledging revenues allocated under said **Article IX, Section 16, may be refunded at a lower net average interest cost rate by the issuance of refunding bonds, maturing not later than the obligations refunded, secured by the same revenues and any other security authorized in paragraph (5) of this subsection.

(4) Subject to the requirements of paragraph (2) of this subsection and after payment of administrative expenses, the "second gas tax" shall be allocated to the account of each of the several counties in amounts to be determined as follows: There shall be an initial allocation of one-fourth in the ratio of county area to state area, one-fourth in the ratio of the total county population to the total population of the state in accordance with the latest available federal census, and one-half in the ratio of the total "second gas tax" collected on retail sales or use in each county to the total collected in all counties of the state during the previous fiscal year. If the annual debt service requirements of any obligations issued for any county, including any deficiencies for prior years, secured under paragraph (2) of this subsection, exceeds the amount which would be allocated to that county under the formula set out in this paragraph, the amounts allocated to other counties shall be reduced proportionately.

(5) Funds allocated under paragraphs (2) and (4) of this subsection shall be administered by the state board of administration created under said **Article IX, Section 16, of the Constitution of 1885, as amended, and which is continued as a body corporate for the life of this subsection 9(c). The board shall remit the proceeds of the "second gas tax" in each county account for use in said county as follows: eighty per cent to the state agency supervising the state road system and twenty per cent to the governing body of the county. The percentage allocated to the county may be increased by general law. The proceeds of the "second gas tax" subject to allocation to the several counties under this paragraph (5) shall be used first, for the payment of obligations pledging revenues allocated pursuant to **Article IX, Section 16, of the Constitution of 1885, as amended, and any refundings thereof; second, for the payment of debt service on bonds issued as provided by this paragraph (5) to finance the acquisition and construction of roads as defined by law; and third, for the acquisition and construction of roads. When authorized by law, state bonds pledging the full faith and credit of the state may be issued without any election: (i) to refund obligations secured by any portion of the "second gas tax" allocated to a county under **Article IX, Section 16, of the Constitution of 1885, as amended; (ii) to finance the acquisition and construction of roads in a county when approved by the governing body of the county and the state agency supervising the state road system; and (iii) to refund obligations

secured by any portion of the "second gas tax" allocated under paragraph 9(c)(4). No such bonds shall be issued unless a state fiscal agency created by law has made a determination that in no state fiscal year will the debt service requirements of the bonds and all other bonds secured by the pledged portion of the "second gas tax" allocated to the county exceed seventy-five per cent of the pledged portion of the "second gas tax" allocated to that county for the preceding state fiscal year, of the pledged net tolls from existing facilities collected in the preceding state fiscal year, and of the annual average net tolls anticipated during the first five years of operation of new projects to be financed. Bonds issued pursuant to this subsection shall be payable primarily from the pledged tolls and portions of the "second gas tax" allocated to that county.

(d) SCHOOL BONDS. ***Article XII, Section 18, of the Constitution of 1885, as amended, as it existed immediately before this revision becomes effective is adopted by this reference as part of this revision as completely as though incorporated herein verbatim, except bonds or tax anticipation certificates hereafter issued thereunder may bear interest not in excess of five per cent per annum or such higher interest as may be authorized by statute passed by a three-fifths vote of each house of the legislature. Bonds issued pursuant to this subsection (d) shall be payable primarily from revenues as provided in ***Article XII, Section 18, of the Constitution of 1885, as amended, and if authorized by law, may be additionally secured by pledging the full faith and credit of the state without an election. When authorized by law, bonds issued pursuant to ***Article XII, Section 18, of the Constitution of 1885, as amended, and bonds issued pursuant to this subsection (d), may be refunded by the issuance of bonds additionally secured by the full faith and credit of the state only at a lower net average interest cost rate.

(e) DEBT LIMITATION. Bonds issued pursuant to this Section 9 of Article XII which are payable primarily from revenues pledged pursuant to this section shall not be included in applying the limits upon the amount of state bonds contained in Section 11, Article VII, of this revision.

*Note.—Section 19 of Art. XII of the Constitution of 1885, as amended, reads as follows:

SECTION 19. Institutions of higher learning and junior college capital outlay trust fund bonds.—(a) That beginning January 1, 1884, and for fifty years thereafter, all of the proceeds of the revenues derived from the gross receipts taxes collected from every person, including municipalities, receiving payment for electricity for light, heat or power, for natural or manufactured gas for light, heat or power, for use of telephones and for the sending of telegrams and telegraph messages, as now provided and levied as of the time of adoption of this amendment in Chapter 203, Florida Statutes (hereinafter called "Gross Receipts Taxes"), shall, as collected be placed in a trust fund to be known as the "Institutions of Higher Learning and Junior Colleges Capital Outlay and Debt Service Trust Fund" in the State Treasury (hereinafter referred to as "Capital Outlay Fund"), and used only as provided in this Amendment.

Said fund shall be administered by the State Board of Education, as now created and constituted by Section 3 of

Article XII [now §2, Article IX] of the Constitution of Florida (hereinafter referred to as "State Board"). For the purpose of this Amendment, said State Board, as now constituted, shall continue as a body corporate during the life of this Amendment and shall have all the powers provided in this Amendment in addition to all other constitutional and statutory powers related to the purposes of this Amendment heretofore or hereafter conferred by law upon said State Board.

(b) The State Board shall have power, for the purpose of obtaining funds for acquiring, building, constructing, altering, improving, enlarging, furnishing or equipping capital outlay projects theretofore authorized by the legislature and any purposes appurtenant or incidental thereto, for Institutions of Higher Learning or Junior Colleges, as now defined or as may be hereafter defined by law, and for the purpose of constructing buildings and other permanent facilities for vocational technical schools as provided in chapter 230 Florida Statutes, to issue bonds or certificates, including refunding bonds or certificates to fund or refund any bonds or certificates theretofore issued. All such bonds or certificates shall bear interest at not exceeding four and one-half per centum per annum, and shall mature at such time or times as the State Board shall determine not exceeding, in any event, however, thirty years from the date of issuance thereof. The State Board shall have power to determine all other details of such bonds or certificates and to sell at public sale, after public advertisement, such bonds or certificates, provided, however, that no bonds or certificates shall ever be issued hereunder to finance, or the proceeds thereof expended for, any part of the cost of any capital outlay project unless the construction or acquisition of such capital outlay project has been theretofore authorized by the Legislature of Florida. None of said bonds or certificates shall be sold at less than ninety-eight per centum of the par value thereof, plus accrued interest, and said bonds or certificates shall be awarded at the public sale thereof to the bidder offering the lowest net interest cost for such bonds or certificates in the manner to be determined by the State Board.

The State Board shall also have power to pledge for the payment of the principal of and interest on such bonds or certificates, and reserves therefor, including refunding bonds or certificates, all or any part of the revenue to be derived from the said Gross Receipts Taxes provided for in this Amendment, and to enter into any covenants and other agreements with the holders of such bonds or certificates concerning the security thereof and the rights of the holders thereof, all of which covenants and agreements shall constitute legally binding and irrevocable contracts with such holders and shall be fully enforceable by such holders in any court of competent jurisdiction.

No such bonds or certificates shall ever be issued by the State Board in an amount exceeding seventy-five per centum of the amount which it determines, based upon the average annual amount of the revenues derived from said Gross Receipts Taxes during the immediately preceding two fiscal years, or the amount of the revenues derived from said Gross Receipts Taxes during the immediately preceding fiscal year, as shown in a certificate filed by the State Comptroller with the State Board prior to the issuance of such bonds or certificates, whichever is the lesser, can be serviced by the revenues accruing thereafter under the provisions of this Amendment; nor shall the State Board, during the first year following the ratification of this amendment, issue bonds or certificates in excess of seven times the anticipated revenue from said Gross Receipts Taxes during said year, nor during each succeeding year, more than four times the anticipated revenue from said Gross Receipts Taxes during such year. No election or approval of qualified electors or freeholder electors shall be required for the issuance of bonds or certificates hereunder.

After the initial issuance of any bonds or certificates pursuant to this Amendment, the State Board may thereafter issue additional bonds or certificates which will rank equally and on a parity, as to lien and source of security for payment from said Gross Receipts Taxes, with any bonds or certificates theretofore issued pursuant to this Amendment, but such additional parity bonds or certificates shall not be issued unless the average annual amount of the revenues derived from said Gross Receipts Taxes during the immediately preceding two fiscal years, or the amount of the revenues derived from said Gross Receipts Taxes during the immediately preceding fiscal year, as shown in a certificate filed by the State Comptroller with the State Board prior to the issuance of such bonds or certificates, whichever is the lesser, shall have been equal to one and one-third times the aggregate amount of principal and interest which will become due in any succeeding fiscal year on all bonds or certificates theretofore issued pursuant to this Amendment and then outstanding, and the additional parity bonds or certificates then proposed to be issued. No bonds, certificates or other obligations whatsoever shall at any time be issued under the provisions of this Amendment, except such bonds or certificates initially issued hereunder, and such additional parity bonds or certificates as provided in this paragraph. Notwithstanding any other provision herein no such bonds or certificates shall be authorized or validated during any biennium in excess of fifty million dollars, except by two-thirds vote of the members elected to each house of the legislature; provided further that during the biennium 1963-1965 seventy-five million dollars may be authorized and validated pursuant hereto.

(c) Capital outlay projects theretofore authorized by the legislature for any Institution of Higher Learning or Junior College shall be eligible to participate in the funds accruing under this Amendment derived from the proceeds of bonds or certificates and said Gross Receipts Taxes under such regulations and in such manner as shall be determined by the State Board, and the State Board shall use or transmit to the State Board of Control or to the Board of Public Instruction of any County authorized by law to construct or acquire such capital outlay projects, the amount of the proceeds of such bonds or certificates or Gross Receipts Taxes to be applied to or used for such capital outlay projects. If for any reason any of the proceeds of any bonds or certificates issued for any capital outlay project shall not be expended for such capital outlay project, the State Board may use such unexpended proceeds for any other capital outlay project for Institutions of Higher Learning or Junior Colleges and vocational technical schools, as defined herein, as now defined or as may be hereafter defined by law, theretofore authorized by the State Legislature. The holders of bonds or certificates issued hereunder shall not have any responsibility whatsoever for the application or use of any of the proceeds derived from the sale of said bonds or certificates, and the rights and remedies of the holders of such bonds or certificates and their right to payment from said Gross Receipts Taxes in the manner provided herein shall not be affected or impaired by the application or use of such proceeds.

The State Board shall use the moneys in said Capital Outlay Fund in each fiscal year only for the following purposes and in the following order of priority:

(1) For the payment of the principal of and interest on any bonds or certificates maturing in such fiscal year.

(2) For the deposit into any reserve funds provided for in the proceedings authorizing the issuance of said bonds or certificates, of any amounts required to be deposited in such reserve funds in such fiscal year.

(3) After all payments required in such fiscal year for the purposes provided for in (1) and (2) above, including any deficiencies for required payments in prior fiscal years, any moneys remaining in said Capital Outlay Fund at the end of such fiscal year may be used by the State Board for direct payment of the cost or any part of the cost of any capital outlay project theretofore authorized by the legislature or for the purchase of any bonds or certificates issued hereunder then outstanding upon such terms and conditions as the State Board shall deem proper, or for the prior redemption of outstanding bonds or certificates in accordance with the provisions of the proceedings which authorized the issuance of such bonds or certificates.

The State Board may invest the moneys in said Capital Outlay Fund or in any sinking fund or other funds created for any issue of bonds or certificates, in direct obligations of the United States of America or in the other securities referred to in Section 344.27, Florida Statutes.

(d) The State Board shall have the power to make and enforce all rules and regulations necessary to the full exercise of the powers herein granted and no legislation shall be required to render this Amendment of full force and operating effect on and after January 1, 1964. The Legislature, during the period this Amendment is in effect, shall not reduce the rate of said Gross Receipts Taxes now provided in said Chapter 203, Florida Statutes, or eliminate, exempt or remove any of the persons, firms or corporations, including municipal corporations, or any of the utilities, businesses or services now or hereafter subject to said Gross Receipts Taxes, from the levy and collection of said Gross Receipts Taxes as now provided in said Chapter 203, Florida Statutes, and shall not enact any law impairing or materially altering the rights of the holders of any bonds or certificates issued pursuant to this Amendment or impairing or altering any covenants or agreements of the State Board made hereunder, or having the effect of withdrawing the proceeds of said Gross Receipts Taxes from the operation of this Amendment.

The State Board of Administration shall be and is hereby constituted the State Fiscal Agent of the State Board to perform such duties and assume such responsibilities under this Amendment as shall be agreed upon between the State Board and such State Board of Administration. The State Board shall also have power to appoint such other persons and fix their compensation for the administration of the provisions of this Amendment as it shall deem necessary, and the expenses of the State Board in administering the provisions of this Amendment shall be paid out of the proceeds of bonds or certificates issued hereunder or from said Gross Receipts Taxes deposited in said Capital Outlay Fund.

(e) No capital outlay project or any part thereof shall be financed hereunder unless the bill authorizing such project shall specify it is financed hereunder and shall be approved by a vote of three-fifths of the elected members of each house.

History.—S.J.R. 264, 1963, adopted 1963.

**Note.—Section 16 of Art. IX of the Constitution of 1885, as amended, reads as follows:

SECTION 16. Board of administration; gasoline and like taxes, distribution and use; etc.—

(a) That beginning January 1st, 1943, and for fifty (50) years thereafter, the proceeds of two (2¢) cents per gallon

of the total tax levied by state law upon gasoline and other like products of petroleum, now known as the Second Gas Tax, and upon other fuels used to propel motor vehicles, shall as collected be placed monthly in the 'State Roads Distribution Fund' in the State Treasury and divided into three (3) equal parts which shall be distributed monthly among the several counties as follows: one part according to area, one part according to population, and one part according to the counties' contributions to the cost of state road construction in the ratio of distribution as provided in Chapter 15659, Laws of Florida, Acts of 1931, and for the purposes of the apportionment based on the counties' contributions for the cost of state road construction, the amount of the contributions established by the certificates made in 1931 pursuant to said Chapter 15659, shall be taken and deemed conclusive in computing the monthly amounts distributable according to said contributions. Such funds so distributed shall be administered by the State Board of Administration as hereinafter provided.

(b) The Governor as chairman, the State Treasurer, and the State Comptroller shall constitute a body corporate to be known as the 'State Board of Administration,' which board shall succeed to all the power, control and authority of the statutory Board of Administration. Said Board shall have, in addition to such powers as may be conferred upon it by law, the management, control and supervision of the proceeds of said two (2) cents of said taxes and all moneys and other assets which on the effective date of this amendment are applicable or may become applicable to the bonds of the several counties of this state, or any special road and bridge district, or other special taxing district thereof, issued prior to July 1st, 1931, for road and bridge purposes. The word 'bonds' as used herein shall include bonds, time warrants, notes and other forms of indebtedness issued for road and bridge purposes by any county or special road and bridge district or other special taxing district, outstanding on July 1st, 1931, or any refunding issues thereof. Said Board shall have the statutory powers of Boards of County Commissioners and Bond Trustees and of any other authority of special road and bridge districts, and other special taxing districts thereof with regard to said bonds, (except that the power to levy ad valorem taxes is expressly withheld from said Board), and shall take over all papers, documents and records concerning the same. Said Board shall have the power from time to time to issue refunding bonds to mature within the said fifty (50) year period, for any of said outstanding bonds or interest thereon, and to secure them by a pledge of anticipated receipts from such gasoline or other fuel taxes to be distributed to such county as herein provided, but not at a greater rate of interest than said bonds now bear; and to issue, sell or exchange on behalf of any county or unit for the sole purpose of retiring said bonds issued by such county, or special road and bridge district, or other special taxing district thereof, gasoline or other fuel tax anticipation certificates bearing interest at not more than three (3) per cent per annum in such denominations and maturing at such time within the fifty (50) year period as the board may determine. In addition to exercising the powers now provided by statute for the investment of sinking funds, said Board may use the sinking funds created for said bonds of any county or special road and bridge district, or other unit hereunder, to purchase the matured or maturing bonds participating herein of any other county or any other special road and bridge district, or other special taxing district thereof, provided that as to said matured bonds, the value thereof as an investment shall be the price paid therefor, which shall not exceed the par value plus accrued interest, and that said investment shall bear interest at the rate of three (3) per cent per annum.

(c) The said board shall annually use said funds in each county account, first, to pay current principal and interest maturing, if any, of said bonds and gasoline or other fuel tax anticipation certificates of such county or special road and bridge district, or other special taxing district thereof; second, to establish a sinking fund account to meet future requirements of said bonds and gasoline or other fuel tax anticipation certificates where it appears the anticipated income for any year or years will not equal scheduled payments thereon; and third, any remaining balance out of the proceeds of said two (2) cents of said taxes shall monthly during the year be remitted by said board as follows: Eighty (80%) per cent to the State Road Department for the construction or reconstruction of state roads and bridges within the county, or for the lease or purchase of bridges connecting state highways within the county, and twenty (20%) per cent to the Board of County Commissioners of such county for use on roads and bridges therein.

(d) Said board shall have the power to make and enforce all rules and regulations necessary to the full exercise of the powers hereby granted and no legislation shall be required to render this amendment of full force and operating effect from and after January 1st, 1943. The Legislature shall continue the levies of said taxes during the life of this Amendment, and shall not enact any law having the effect of withdrawing the proceeds of said two (2) cents of said taxes from the operation of this amendment. The board shall pay refunding expenses and other expenses for services rendered specifically for, or which are properly chargeable to, the account of any county from funds distributed to such county; but general expenses of the

board for services rendered all the counties alike shall be prorated among them and paid out of said funds on the same basis said tax proceeds are distributed among the several counties; provided, report of said expenses shall be made to each Regular Session of the Legislature, and the Legislature may limit the expenses of the board.

History.—Added, S.J.R. 324, 1941; adopted 1942.

***Note.—Section 18, Art. XII of the Constitution of 1885, as amended, reads as follows:

SECTION 18. School bonds for capital outlay, issuance.—

(a) Beginning January 1, 1965 and for thirty-five years thereafter, the first proceeds of the revenues derived from the licensing of motor vehicles to the extent necessary to comply with the provisions of this amendment, shall, as collected, be placed monthly in the county capital outlay and debt service school fund in the state treasury, and used only as provided in this amendment. Such revenue shall be distributed annually among the several counties in the ratio of the number of instruction units in each county in each year computed as provided herein. The amount of the first revenues derived from the licensing of motor vehicles to be so set aside in each year and distributed as provided herein shall be an amount equal in the aggregate to the product of four hundred dollars multiplied by the total number of instruction units in all the counties of Florida. The number of instruction units in each county in each year for the purposes of this amendment shall be the greater of (1) the number of instruction units in each county for the school fiscal year 1951-52 computed in the manner heretofore provided by general law, or (2) the number of instruction units in such county for the school fiscal year computed in the manner heretofore or hereafter provided by general law and approved by the state board of education (hereinafter called the state board), or (3) the number of instruction units in each county on behalf of which the state board of education has issued bonds or motor vehicle tax anticipation certificates under this amendment which will produce sufficient revenues under this amendment to equal one and one-third times the aggregate amount of principal of and interest on such bonds or motor vehicle tax anticipation certificates which will mature and become due in such year computed in the manner heretofore or hereafter provided by general law and approved by the state board.

Such funds so distributed shall be administered by the state board as now created and constituted by Section 3 of Article XII (now §2, Article IX) of the Constitution of Florida. For the purposes of this amendment, said state board, as now constituted, shall continue as a body corporate during the life of this amendment and shall have all the powers provided in this amendment in addition to all other constitutional and statutory powers related to the purposes of this amendment heretofore or hereafter conferred upon said board.

(b) The state board shall, in addition to its other constitutional and statutory powers, have the management, control and supervision of the proceeds of the first part of the revenues derived from the licensing of motor vehicles provided for in subsection (a). The state board shall also have power, for the purpose of obtaining funds for the use of any county board of public instruction in acquiring, building, constructing, altering, improving, enlarging, furnishing, or equipping capital outlay projects for school purposes, to issue bonds or motor vehicle tax anticipation certificates, and also to issue such bonds or motor vehicle tax anticipation certificates to pay, fund or refund any bonds or motor vehicle tax anticipation certificates theretofore issued by said state board. All such bonds shall bear interest at not exceeding four and one-half per centum per annum and shall mature serially in annual installments commencing not more than three years from the date of issuance thereof and ending not later than thirty years from the date of issuance or January 1, 2000, A.D., whichever is earlier. All such motor vehicle tax anticipation certificates shall bear interest at not exceeding four and one-half per centum per annum and shall mature prior to January 1, 2000, A.D. The state board shall have power to determine all other details of said bonds or motor vehicle tax anticipation certificates and to sell at public sale after public advertisement, or exchange said bonds or motor vehicle tax anticipation certificates, upon such terms and conditions as the state board shall provide.

The state board shall also have power to pledge for the payment of the principal of and interest on such bonds or motor vehicle tax anticipation certificates, including refunding bonds or refunding motor vehicle tax anticipation certificates, all or any part from the anticipated revenues to be derived from the licensing of motor vehicles provided for in this amendment and to enter into any covenants and other agreements with the holders of such bonds or motor vehicle tax anticipation certificates at the time of the issuance thereof concerning the security thereof and the rights of the holders thereof, all of which covenants and agreements shall constitute legally binding and irrevocable contracts with such holders and shall be fully enforceable by such holders in any court of competent jurisdiction.

No such bonds or motor vehicle tax anticipation certificates shall ever be issued by the state board until after the adoption of a resolution requesting the issuance thereof by the county board of public instruction of the county on behalf of which such obligations are to be issued. The state board of education

shall limit the amount of such bonds or motor vehicle tax anticipation certificates which can be issued on behalf of any county to seventy-five per cent of the amount which it determines can be serviced by the revenue accruing to the county under the provisions of this amendment, and such determination shall be conclusive. All such bonds or motor vehicle tax anticipation certificates shall be issued in the name of the state board of education but shall be issued for and on behalf of the county board of public instruction requesting the issuance thereof, and no election or approval of qualified electors or freeholders shall be required for the issuance thereof.

(c) The State Board shall in each year use the funds distributable pursuant to this Amendment to the credit of each county only in the following manner and order of priority:

(1) To pay all amounts of principal and interest maturing in such year on any bonds or motor vehicle tax anticipation certificates issued under the authority hereof, including refunding bonds or motor vehicle tax anticipation certificates, issued on behalf of the Board of Public Instruction of such county; subject, however, to any covenants or agreements made by the State Board concerning the rights between holders of different issues of such bonds or motor vehicle tax anticipation certificates, as herein authorized.

(2) To establish and maintain a sinking fund or funds to meet future requirements for debt service, or reserves therefor, on bonds or motor vehicle tax anticipation certificates issued on behalf of the Board of Public Instruction of such county, under the authority hereof, whenever the State Board shall deem it necessary or advisable, and in such amounts and under such terms and conditions as the State Board shall in its discretion determine.

(3) To distribute annually to the several Boards of Public Instruction of the counties for use in payment of debt service on bonds heretofore or hereafter issued by any such Board where the proceeds of the bonds were used, or are to be used, in the construction, acquisition, improvement, enlargement, furnishing, or equipping of capital outlay projects in such county, and which capital outlay projects have been approved by the Board of Public Instruction of the county, pursuant to a survey or surveys conducted subsequent to July 1, 1947 in the county, under regulations prescribed by the State Board to determine the capital outlay needs of the county.

The State Board shall have power at the time of issuance of any bonds by any Board of Public Instruction to covenant and agree with such Board as to the rank and priority of payments to be made for different issues of bonds under this Subsection (3), and may further agree that any amounts to be distributed under this Subsection (3) may be pledged for the debt service on bonds issued by any Board of Public Instruction and for the rank and priority of such pledge. Any such covenants or agreements of the State Board may be enforced by any holders of such bonds in any court of competent jurisdiction.

(4) To distribute annually to the several Boards of Public Instruction of the counties for the payment of the cost of the construction, acquisition, improvement, enlargement, furnishing, or equipping of capital outlay projects for school purposes in such county as shall be requested by resolution of the County Board of Public Instruction of such county.

(5) When all major capital outlay needs of a county have been met as determined by the State Board, on the basis of a survey made pursuant to regulations of the State Board and approved by the State Board, all such funds remaining shall be distributed annually and used for such school purposes in such county as the Board of Public Instruction of the county shall determine, or as may be provided by general law.

(d) Capital outlay projects of a county shall be eligible to participate in the funds accruing under this Amendment and derived from the proceeds of bonds and motor vehicle tax anticipation certificates and from the motor vehicle license taxes, only in the order of priority of needs, as shown by a survey or surveys conducted in the county under regulations prescribed by the State Board, to determine the capital outlay needs of the county and approved by the State Board; provided, that the priority of such projects may be changed from time to time upon the request of the Board of Public Instruction of the county and with the approval of the State Board; and provided further, that this Subsection (d) shall not in any manner affect any covenant, agreement, or pledge made by the State Board in the issuance by said State Board of any bonds or motor vehicle tax anticipation certificates, or in connection with the issuance of any bonds of any Board of Public Instruction of any county.

(e) The State Board may invest any sinking fund or funds created pursuant to this Amendment in direct obligations of the United States of America or in the bonds or motor vehicle tax anticipation certificates, matured or to mature, issued by the State Board on behalf of the Board of Public Instruction of any county.

(f) The State Board shall have power to make and enforce all rules and regulations necessary to the full exercise of the powers herein granted and no legislation shall be required to render this Amendment of full force and operating effect from and after January 1, 1953. The Legislature shall not reduce the levies of said motor vehicle license taxes during the life of

this Amendment to any degree which will fail to provide the full amount necessary to comply with the provisions of this Amendment and pay the necessary expenses of administering the laws relating to the licensing of motor vehicles, and shall not enact any law having the effect of withdrawing the proceeds of such motor vehicle license taxes from the operation of this Amendment and shall not enact any law impairing or materially altering the rights of the holders of any bonds or motor vehicle tax anticipation certificates issued pursuant to this Amendment or impairing or altering any covenant or agreement of the State Board, as provided in such bonds or motor vehicle tax anticipation certificates.

The State Board shall have power to appoint such persons and fix their compensation for the administration of the provisions of this Amendment as it shall deem necessary, and the expenses of the State Board in administering the provisions of this Amendment shall be prorated among the various counties and paid out of the proceeds of the bonds or motor vehicle tax anticipation certificates or from the funds distributable to each county on the same basis as such motor vehicle license taxes are distributable to the various counties under the provisions of this Amendment. Interest or profit on sinking fund investments shall accrue to the counties in proportion to their respective equities in the sinking fund or funds.

History.—Added S.J.R. 106, 1951; adopted, 1952; (a), (b) Am. S.J.R. 218, 1963; adopted, 1964.

SECTION 10. Preservation of existing government.—All provisions of Articles I through IV, VII and IX through XX of the Constitution of 1885, as amended, not embraced herein which are not inconsistent with this revision shall become statutes subject to modification or repeal as are other statutes.

SECTION 11. Deletion of obsolete schedule items.—The legislature shall have power, by joint resolution, to delete from this revision any section of this Article XII, including this section, when all events to which the section to be deleted is or could become applicable have occurred. A legislative determination of fact made as a basis for application of this section shall be subject to judicial review.

SECTION 12. Senators.—The requirements of staggered terms of senators in Section 15(a), of Article III of this revision shall apply only to senators elected in November, 1972, and thereafter.

SECTION 13. Legislative apportionment.—The requirements of legislative apportionment in Section 16 of Article III of this revision shall apply only to the apportionment of the legislature following the decennial census of 1970, and thereafter.

SECTION 14. Representatives; terms.—The legislature at its first regular session following the ratification of this revision, by joint resolution, shall propose to the electors of the state for ratification or rejection in the general election of 1970 an amendment to Article III, Section 15(b), of the constitution providing staggered terms of four years for members of the house of representatives.

SECTION 15. Special district taxes.—Ad valorem taxing power vested by law in special districts existing when this revision becomes effective shall not be abrogated by Section 9(b) of Article VII herein, but such powers, except to the extent necessary to pay outstanding debts, may be restricted or withdrawn by law.

SECTION 16. Reorganization.—The require-

ment of Section 6, Article IV of this revision shall not apply until July 1, 1969.

SECTION 17. Conflicting provisions.—This schedule is designed to effect the orderly tran-

sition of government from the Constitution of 1885, as amended, to this revision and shall control in all cases of conflict with any part of Article I through IV, VII, and IX through XI herein.

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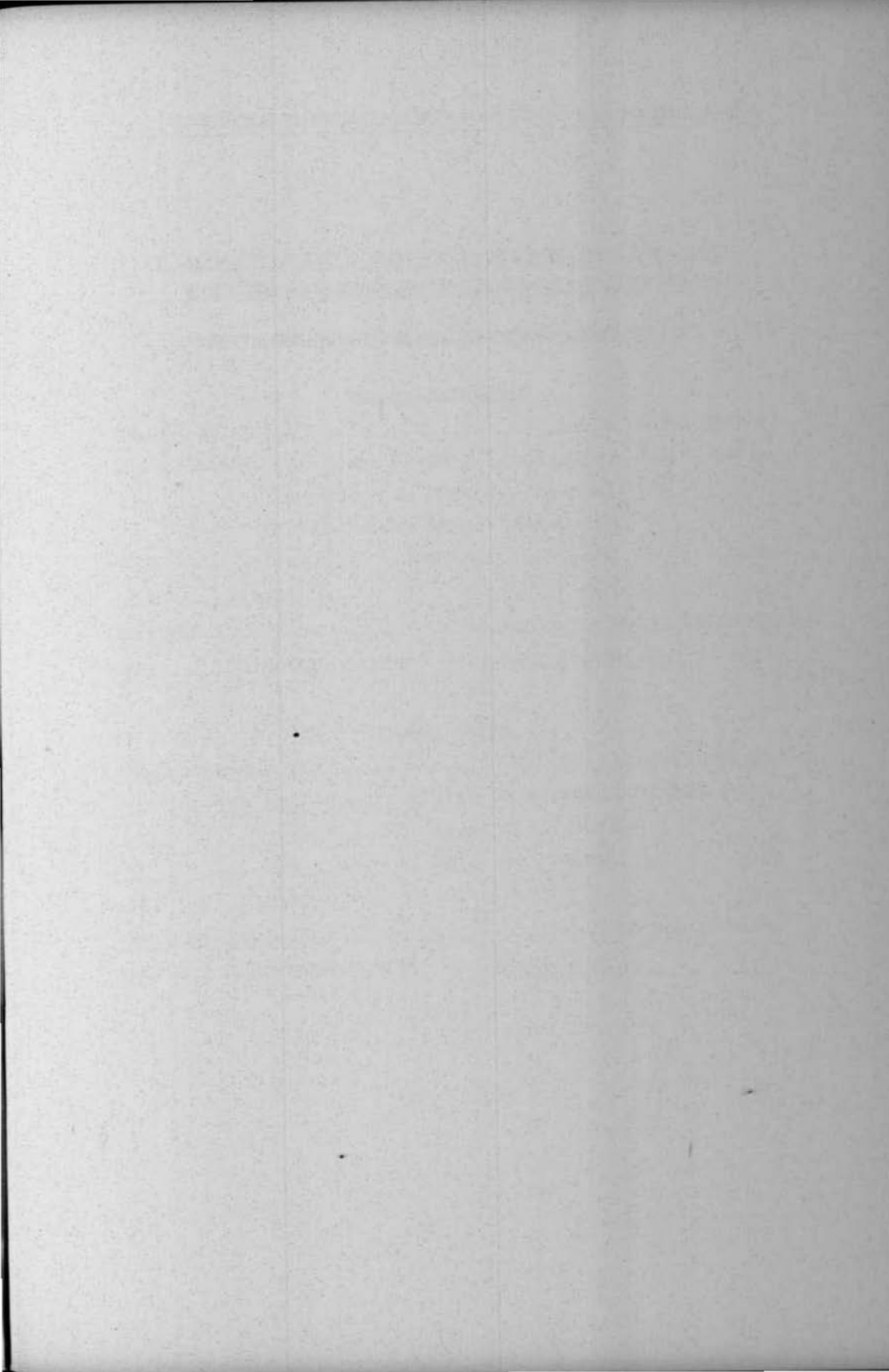
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COMPILED STATEMENT OF CASES HANDLED IN THE ATTORNEY GENERAL'S OFFICE

JANUARY 1, 1967 THROUGH DECEMBER 31, 1967

CRIMINAL CASES

CASES PENDING	1,427
NEW CASES—Tallahassee	—386
Lakeland	—227
Vero Beach	—286
Miami	—371
	<u>1,270</u>
TOTAL.....	2,697
CLOSED CASES	<u>712</u>
TOTAL PENDING.....	1,985

CIVIL CASES

CASES PENDING	631
NEW CASES—Tallahassee	—715
Miami	— 65
Tampa	— 10
	<u>790</u>
TOTAL.....	1,421
CLOSED CASES	<u>384</u>
TOTAL PENDING.....	1,037

COMPILED STATEMENT OF CASES HANDLED IN THE ATTORNEY GENERAL'S OFFICE

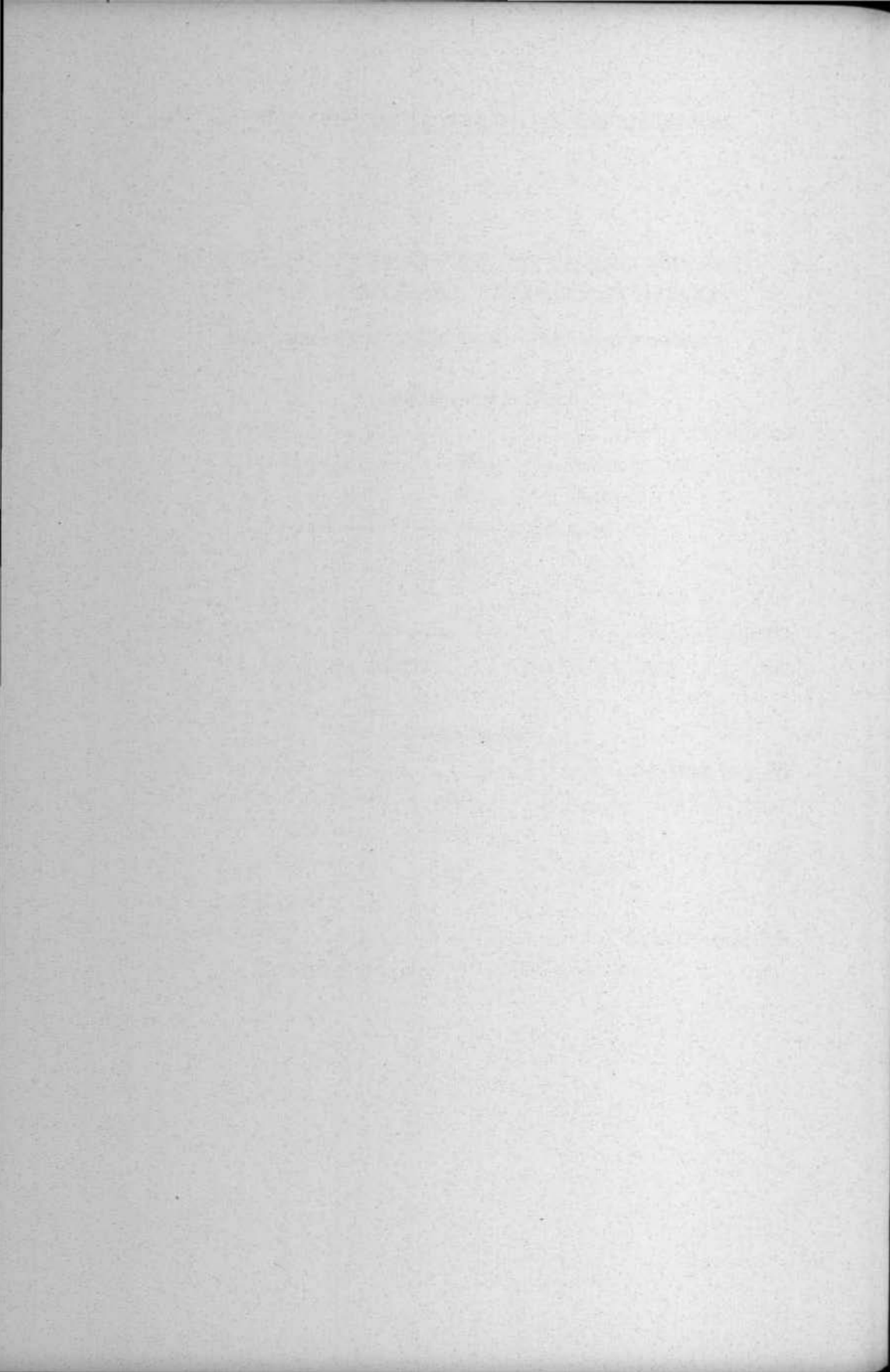
JANUARY 1, 1968 THROUGH DECEMBER 31, 1968

CRIMINAL CASES

CASES PENDING	1,985
NEW CASES—Tallahassee	—436
Lakeland	—393
W. Palm Beach	—321
Miami	—423
	<u>1,573</u>
TOTAL.....	3,558
CLOSED CASES	<u>1,103</u>
TOTAL PENDING.....	2,455

CIVIL CASES

CASES PENDING	1,037
NEW CASES—Tallahassee	—1,015
Miami	— 15
Tampa	— 10
	<u>1,040</u>
TOTAL.....	2,077
CLOSED CASES	<u>572</u>
TOTAL PENDING.....	1,505



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